COMMON MARKET LAW REVIEW

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Aims
The Common Market Law Review is designed to function as a medium for the understanding and implementation of European Union Law within the Member States and elsewhere, and for the dissemination of legal thinking on European Union Law matters. It thus aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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THE EMERGENCE OF A PARALLEL SYSTEM OF SOCIAL SECURITY COORDINATION

NICOLAS RENNUY*

1. Introduction

In a series of recent cases, the ECJ laid the foundations for a new system of international social security protection. European social security legislation in principle designates one Member State as competent, thereby freeing all others from social security responsibilities. For instance, the posting rules entitle workers to carry out work temporarily in a Member State while remaining *exclusively* subject to the social security legislation of their home State. Disregarding the applicable European and national provisions, the ECJ ruled that, under certain circumstances, a posted worker can *also* claim benefits under the social security scheme of the host Member State.[1] The ECJ thereby imposes additional social security responsibilities on Member States other than the competent State, allowing a migrant to gain access simultaneously to the social security systems of two or more Member States.

Of course, *all* non-competent Member States are not bound to grant *all* their benefits to *all* claimants. The ECJ accordingly devised a new allocation of social security duties, based on a double mechanism. Firstly, the ECJ lifts the prohibition on the Member States lacking competence to apply their legislation; such States are henceforth allowed to grant benefits to uninsured persons at their own volition. The *Hudzinski and Wawrzyniak* cases however clarify that they are able to exclude persons from the benefit of their social security system only if, in doing so, they comply with the principle of proportionality. Thus, that principle opens a second gate to the judge-made system of social protection.

This contribution describes this exercise in social engineering and its practical and theoretical consequences. Before broaching the innovative case law, the traditional system of social protection which it supplements is outlined. Next, both branches are explained as flowing from respectively a new understanding of the doctrine of pre-emption and a new conception of the

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1. Joined Cases C-611 & 612/10, *Hudzinski and Wawrzyniak*, judgment of 12 June 2012, nyr.

principle of proportionality rooted in the case law on Union citizenship. After describing their effects in terms of rights and duties, their constitutional implications for the hierarchy of norms in European social security law are set out. This article aims at determining the social security duties of Member States that do not flow from the provisions of secondary law and thereby answer the question what it means for a State not to be competent.

1.1. *Conflict rules and substantive rules*

The Member States retain the power to organize their social security systems, provided that they comply with the provisions of European law in force.[2] They use both internal and external conditions to open and close the scope of their schemes. Some requirements, such as age-limits for family benefits, have no specific impact upon migrants. From an internal market perspective, there is little need to regulate such "internal conditions".

Member States attune the personal scope of their social security systems to what they consider to be their circle of solidarity. Persons having a connection with their society which warrants inclusion in that circle, and only those, should be afforded social security protection. This privileged connection is formalized through "external conditions", the most common of which confine protection to persons who reside or work in the territory of the State concerned (and their family members). External conditions have an including and an excluding function: members of the solidaristic community are protected against social security risks and liable to contribute to the funding of the corresponding schemes; others are refused rights and free from duties. Such conditions particularly affect migrants. When external conditions deny migrants social security benefits (exclusionary dimension) or impose contribution duties upon them (inclusionary dimension), they may raise obstacles to the free movement of persons. Two types of obstacles must be distinguished.

Firstly, it may be unclear which social security legislation applies to a migrant. For instance, a frontier worker residing in Member State A and working in Member State B would be insured twice if Member State A considers all its residents to be insured, while the social security legislation of Member State B includes all persons who are economically active within its territory (i.e. a positive conflict of laws). This double inclusion entails a double burden, as frontier workers would be liable to contribute to the funding of the social security schemes of both States. Conversely, a lack of insurance would arise for a frontier worker habitually residing in Member State B and

2. E.g. Case 275/81, *Koks*, [1982] ECR 3013, para 10; Case C-137/11, *Partena*, judgment 27 Sept. 2012, para 59.

employed in Member State A (i.e. a negative conflict of laws). The combined excluding conditions of the two States in question would leave the frontier worker without social security protection and hence constitute an obstacle to free movement. This question of competence calls for an intervention of European law, which vests competence with the one Member State to which a person is deemed to be most closely connected.

Once competence has been allocated to a single Member State, that State's legislation must be applied. The external conditions laid down in that legislation might however raise an obstacle to free movement, particularly if they exclude migrants from social security benefits. For instance, the competent Member State of employment may suspend the payment of family benefits because the frontier worker and the members of his family reside abroad. This is the question of entitlement.

As Advocate General Mazák opined, the distinction between the question of the competence of a Member State with regard to a particular benefit and the question of the actual entitlement to a benefit is "the key to a proper understanding" of the case law discussed here.[3] European law addresses the issues by means of two regulations (basic Reg. 1408/71 and implementing Reg. 574/72), which were recently replaced by a new generation of regulations (basic Reg. 883/2004 and implementing Reg. 987/2009)[4] laying down a system of coordination that "adjust[s] social security schemes in relation to each other (as well as to those of international regulations) in order to regulate transnational questions, with the objective of protecting the social security position of migrants".[5]

The question of competence is solved through European conflict rules. In general, these subject economically active persons to the legislation of their place of activity and economically inactive persons to the laws of the Member State in which they reside. As demonstrated, if that question were left to

3. Opinion of A.G. Mazák in Case C-352/06, *Bosmann*, [2008] ECR I-3827, para 56. This distinction between "Kollisionsnormen" and "Sachnormen", which finds its origin in international private law, is well-established in the German literature on international social security law (e.g. Devetzi, *Die Kollisionsnormen des Europäischen Sozialrechts* (Duncker und Humblot, 2000), pp. 121–198; Eichenhofer, *Sozialrecht der Europäischen Union*, 4th ed. (Erich Schmidt Verlag, 2010), pp. 111–114) and reverberates in some ECJ cases (see e.g. Case 101/83, *Brusse*, [1984] ECR 2223, para 28; Case 302/84, *Ten Holder*, [1986] ECR 1821).

4. Regulation 1408/71 on the application of social security schemes to employed persons and their families moving within the Community, O.J. 1971, L 149/2; Regulation 574/72 fixing the procedure for implementing Regulation 1408/71, O.J. 1972, L 74/1; Regulation 883/2004 on the coordination of social security systems, O.J. 2004, L 166/1; Regulation 987/2009 laying down the procedure for implementing Regulation 883/2004, O.J. 2009, L 284/1. They are now complemented by Directive 2011/24 on the application of patients' rights in cross-border healthcare, O.J. 2011, L 88/45.

5. Pennings, *European Social Security Law*, 5th ed. (Intersentia, 2010), p. 6.

national discretion, some persons might be insured in more than one Member State, while others would not be insured at all. These consequences are best avoided through a harmonization of the conflict rules. The question of competence is governed solely by the conflict rules of the Regulations,[6] which provide a complete and uniform set of conflict rules[7] in order to "prevent the simultaneous application of a number of national legislative systems and the complications which might ensue, but also to ensure that the persons covered by Regulation No 1408/71 are not left without social security cover because there is no legislation which is applicable to them".[8]

This aim is attained by ascribing two interwoven qualities to the European conflict rules. Firstly, they designate *one* Member State. That country is compelled to apply its legislation and cannot rely on any rule that provides otherwise. For instance, if the Member State of employment is competent according to the Regulation, that State cannot decline its competence with respect to non-resident workers on the grounds that it applies only to residents.[9] This so-called "compulsory" or "strong effect" of the European conflict rules overrules dissonant national conflict rules.[10] The "prohibitive" or "exclusive effect" of the European provisions determining the applicable legislation ensures that *only one* legislation applies. The exclusivity principle laid down in Article 13(1) Regulation 1408/71 and Article 11(1) Regulation 883/2004 means that Member States lacking competence under the European conflict rules are not allowed to apply their social security legislation, either to levy contributions (the *Perenboom* case)[11] or to award benefits (the *Ten Holder* case).[12] Hence, unless the Regulation provides otherwise, only one State's legislation applies at any given point in time. Exceptions expressly laid

6. Art. 13(1) Regulation 1408/71 and Art. 11(1) Regulation 883/2004. See also e.g. Case 276/81, *Kuijpers*, [1982] ECR 3027, para 14.

7. *Ten Holder*, cited *supra* note 3, para 21; Case 60/85, *Luijten*, [1986] ECR 2365, para 14; Case C-2/89, *Kits van Heijningen*, [1990] ECR I-1755, para 12; Case C-196/90, *De Paep*, [1991] ECR I-4815, para 18; Case C-71/93, *Van Poucke*, [1994] ECR I-1101, para 22; Case C-425/93, *Calle Grenzshop Andresen*, [1995] ECR I-269, para 9; Case C-131/95, *Huijbrechts*, [1997] ECR I-1409, para 17; Case C-275/96, *Kuusijärvi*, [1998] ECR I-3419, para 28; Case C-202/97, *Fitzwilliam*, [2000] ECR I-883, para 20; Case C-404/98, *Plum*, [2000] ECR I-9379, para 18; Case C-302/02, *Laurin Effing*, [2005] ECR I-553, para 38; Case C-115/11, *Format*, judgment of 4 Oct. 2012, nyr, para 29.

8. *Kits van Heijningen*, ibid., para 12, repeated in, *inter alia*, *De Paep*, ibid., para 18.

9. *Kits van Heijningen*, ibid., paras. 20–22.

10. *Kuijpers*, cited *supra* note 6; *Kits van Heijningen*, ibid., paras. 20–22 and operative part; *De Paep*, cited *supra* note 7, paras. 18–21 and operative part; Case C-347/10, *Salemink*, judgment of 17 Jan. 2012, nyr, paras. 40–42.

11. Case 102/76, *Perenboom*, [1977] ECR 815. See also Case C-60/93, *Aldewereld*, [1994] ECR I-2991; Case C-34/98, *Commission* v. *France (CRDS)*, [2000] ECR I-995; Case C-169/98, *Commission* v. *France (CSG)*, [2000] ECR I-1049.

12. *Ten Holder*, cited *supra* note 3.

down in the Regulations delegate some parcels of competence to other Member States in order to meet (usually benefit-)specific needs.[13] The virtues of the principle of exclusivity are manifold. The ECJ constantly refers to the need to avoid the complications which might ensue from the concurrent application of several national legislative systems.[14] Besides, the principle is "aimed specifically at eliminating unequal treatment which is the consequence of partial or total overlapping of the legislation".[15] Indeed, persons liable to contributions under the legislation of a non-competent Member State in addition to their duties in the competent State suffer a discriminatory disadvantage as compared with persons who are subject only to the non-competent State's social security system.[16] The principle of exclusivity also contributes to legal certainty.[17] It thus serves "the interests of both workers and employers as much as of insurance funds"[18] and facilitates the free movement of employed and self-employed persons within the Union.[19]

Just like the substantive rules of the Regulation, the conflict rules must comply with the Treaty provisions on free movement. In the past, the ECJ has used the Treaty as a benchmark to interpret the conflict rules, sometimes even *contra legem*,[20] and to test their validity.[21]

Once the applicable legislation has been determined by the conflict rules, the substantive questions of rights (benefits) and duties (contributions) must be answered. These questions are governed by both national and European law, i.e. the social security Regulations and, to a certain extent, the free movement provisions of the TFEU. The Member States have the power to shape their social security schemes. As long as they observe EU law, they keep control over most constitutive aspects of their systems, such as the conditions creating the right or the obligation to become affiliated to a social security

13. See e.g. Case C-372/02, *Adanez-Vega*, [2004] ECR I-10761, para 19 et seq.

14. See e.g. the cases referred to in note 7 *supra*, on the understanding that the relevant paragraphs of *Ten Holder* and *Luijten* are respectively para 19 and para 12. This case law is codified in recital 8 in the preamble to Regulation 1408/71 and recital 15 in the preamble to Regulation 883/2004.

15. *Commission* v. *France (CRDS)*, cited *supra* note 11, para 46 and *Commission* v. *France (CSG)*, cited *supra* note 11, para 43; see also Case C-249/04, *Allard*, [2005] ECR I-4535, para 31; Case C-493/04, *Piatkowski*, [2006] ECR I-2369, para 21.

16. See *Commission* v. *France (CRDS)*, cited *supra* note 11, paras. 45–48 and *Commission* v. *France (CSG)*, cited *supra* note 11, paras. 42–45.

17. *Hudzinski and Wawrzyniak*, cited *supra* note 1, para 67.

18. Case 19/67, *van der Vecht*, [1967] ECR (English spec. ed.) 345, at 353.

19. *Allard*, cited *supra* note 15, paras. 31–32.

20. E.g. Case 1/85, *Miethe*, [1986] ECR 1837. See also Case C-443/11, *Jeltes*, judgment of 11 April 2013, nyr.

21. Case 41/84, *Pinna I*, [1986] ECR 1 (invalid); Case C-242/99, *Vogler*, [2000] ECR I-9083 (valid); Joined Cases C-393 & 394/99, *Hervein II*, [2002] ECR I-2829 (valid).

scheme or to a particular branch under such a scheme;[22] the conditions for the acquisition, retention, loss or suspension of the right to social security benefits;[23] and the method of calculating their amount.[24] The European intrusion into national regulatory autonomy is targeted: only those external norms which conflict with the overarching instrument are set aside. For instance, Article 7 Regulation 883/2004 requires States to "export" their cash benefits to beneficiaries residing in another Member State. The European legislation falls short of harmonizing national social security law: all internal rules and some external rules are determined by national law only.

That explains why coordination is said to be neutral.[25] Given the residual powers of the Member States, the landscape of social security law is diverse. Therefore, movement entailing a change in the connecting factor (the place of (self-)employment or residence) triggers a change in applicable legislation, which in turn leads to a different set of social security rights and duties. This package may be more or less favourable than the one applying prior to the switch in applicable legislation. The ECJ repeatedly underscored that a shift to a less favourable legislation may in principle be compatible with the Treaty provisions on freedom of movement for persons, since the primary law of the EU offers no guarantee to citizens that taking up residence or employment in another Member State will be neutral in terms of social security.[26] The European (conflict) rules are neutral (they distribute social security responsibilities and entitlements without regard to their substance), while migration is not (it affects the migrant's social security position through the (change in) applicable national legislation). Many negative consequences of migration are averted through the provisions of the coordinating Regulations and, to a certain extent, a direct recourse to the free movement provisions of the TFEU. The adverse effects which inexorably flow from the disparities between social security schemes are, however, *inherent* in a system of mere

22. Case 110/79, *Coonan*, [1980] ECR 1445, para 12.

23. Case 1/78, *Kenny*, [1978] ECR 1489, para 16.

24. Case C-305/92, *Hoorn*, [1994] ECR I-1525, para 13.

25. See e.g. *Pinna I*, cited *supra* note 21, para 20; Case C-340/94, *de Jaeck*, [1997] ECR I-461, para 18; Case C-221/95, *Hervein I*, [1997] ECR I-609, para 16; *Hervein II*, cited *supra* note 21, paras. 50–52; *Piatkowski*, cited *supra* note 15, para 34; Case C-208/07, *von Chamier-Glisczinski*, [2009] ECR I-6095, paras. 84–87; Case C-3/08, *Leyman*, [2009] ECR I-9085, paras. 40 and 45; Case C-211/08, *Commission* v. *Spain (hospital care during stay abroad)*, [2010] ECR I-5267, para 61; Case C-345/09, *Van Delft*, [2010] ECR I-9879, paras. 99–101 and 106; Case C-388/09, *da Silva Martins*, judgment of 30 June 2011, nyr, paras. 71–72; *Hudzinski and Wawrzyniak*, cited *supra* note 1, para 42–43; Case C-562/10, *Commission* v. *Germany (long-term care benefits)*, judgment of 12 July 2012, nyr, paras. 57–58; Case C-619/11, *Dumont de Chassart*, judgment of 21 Feb. 2013, nyr, para 40.

26. E.g. *da Silva Martins*, cited *supra* note 25, para 72; *Hudzinski and Wawrzyniak*, cited *supra* note 1, para 43; *Commission* v. *Germany (long-term care benefits)*, cited *supra* note 25, para 58.

coordination. That is the case for the obstacle caused by the shift of competence from a Member State with a relatively advantageous social security system to a State with relatively disadvantageous social security legislation.[27] Since such impediments are an inevitable by-product of the choice not to harmonize social security schemes, they should be tolerated. Competence is a necessary,[28] but not sufficient condition for entitlement. A person might not satisfy all internal and (lawful) external requirements for receiving social security benefits in the competent Member State.

1.2. *The principle of inviolability of purely national rights*

Amongst the substantive rules, one should hold our attention in particular since it does, to a great extent, underlie the new system of social protection. The principle of supremacy grants European law a position superior to national law and gives it precedence over conflicting national law. However, this begs the question as to what is a "conflict". That is the domain of the doctrine of pre-emption, which allows to determine the extent to which national law is displaced by European law. Since "[t]he spectrum of conflict is open-ended and ranges from purely hypothetical frictions to literal contradictions between norms",[29] the legislating, executive and judicial bodies of the European Union and its Member States, and, ultimately, the ECJ must establish the extent to which national law conflicts with the Regulations and the TFEU and is therefore displaced by them. While much of this assessment is done on a case-by-case basis, one general guideline was issued by the ECJ and subsequently endorsed by the European legislature: where national law is more beneficial to a migrant when taken in isolation than when applied together with the Regulation, it cannot be pre-empted.

Article 48 TFEU is the main legal basis for the European coordination of social security. Its "principal objective" is, in the eyes of the ECJ, to contribute to "[t]he establishment of as complete a freedom of movement for workers as possible".[30] In the field of social security law, this translates as the protection of the social security rights of *migrant* persons and their family members. This

27. See e.g. *Hervein II*, cited *supra* note 21, para 51; *da Silva Martins*, cited *supra* note 25, para 72; *Commission* v. *Germany (long-term care benefits)*, cited *supra* note 25, para 58.

28. At least, prior to *Bosmann*, cited *supra* note 3.

29. Schütze, "Supremacy without pre-emption? The very slowly emergent doctrine of Community pre-emption", (2006) CML Rev., 1034.

30. Case 75/63, *Hoekstra*, [1964] ECR (English spec. ed.) 184. See e.g. Case 92/63, *Nonnenmacher*, [1964] ECR (English spec. ed.) 288; Case C-215/99, *Jauch*, [2001] ECR I-1901, para 20; Case C-287/05, *Hendrix*, [2007] ECR I-6909, para 52; *da Silva Martins*, cited *supra* note 25, para 70 and case law cited; *Hudzinski and Wawrzyniak*, cited *supra* note 1, para 53; *Partena*, cited *supra* note 2, para 46; *Dumont de Chassart*, cited *supra* note 25, para 53.

objective is primarily realized through the social security Regulations adopted on the basis of Article 48 TFEU, which are premised on the idea that national law grants inadequate protection to migrants. Therefore, "the said regulations, regarded as a whole, are intended, in certain circumstances, to benefit the migrant worker as compared with the situation which would result for him from the exclusive application of national law".[31] This assumption does not hold true in all cases. When national law, taken in isolation, offers a better social security protection than if it were supplemented by the Regulation, a paradox comes into being. If the Regulations were to pre-empt such conflicting but mobility-friendly national legislation, they would upset their principal purpose. Enforcing the letter of the Regulations would prejudice their spirit. In its *van der Veen* judgment, the ECJ prioritized the spirit and accordingly ruled that, in those circumstances, national law should prevail over the Regulations.[32] It explained that the reduction of purely national rights by the Regulations would run counter to the aim of Articles 48 to 51 EEC (now Arts. 45 to 48 TFEU). The European legislature's mandate to coordinate social security laws is limited in that it does not empower it to diminish rights which exist under national legislation only. The application of some provisions of the Regulation "have no purpose in the case of a Statute in which the result sought by Article 51 [now Art. 48 TFEU] is already attained by virtue of national legislation alone".[33] Consequently, "Regulation No 1408/71 may not be interpreted as prohibiting national legislation from granting social security benefits broader than those provided for by the application of that regulation".[34] Progressively, that finding reached the status of a general, constitutional principle of European social security law: the principle of inviolability of purely national rights. The *Petroni* judgment clarified that it is not only based on primary law, but is also part of it. In that case, Article 46(3) Regulation 1408/71 was struck down as *ultra vires* the EEC Treaty insofar as it allowed reductions of rights acquired on the grounds of domestic law only.[35] This prompted Advocate General Warner to baptize it the "*Petroni*

31. Case 1/67, *Ciechelski*, [1967] ECR (English spec. ed.) 188.
32. Case 100/63, *van der Veen*, [1964] ECR (English spec. ed.) 565.
33. *Ciechelski*, cited *supra* note 31, 189.
34. Case 21/87, *Borowitz*, [1988] ECR 3715, para 24. See also Case 69/79, *Jordens-Vosters*, [1980] ECR 75, para 11.
35. Case 24/75, *Petroni*, [1975] ECR 1149. See also Case 112/76, *Manzoni*, [1977] ECR 1647.

principle".[36] The principle steadily spread across all branches of social security[37] and formed the object of codification.[38]

1.3. *Strict exclusivity*

The principle of inviolability of purely national rights applies to the question of entitlement. If the legislation of the competent Member State is more generous than the Regulations, it reigns. However, it was long unclear whether it equally applied to the question of competence. A most interesting dilemma arises when a person satisfies all conditions for entitlement to benefits under the legislation of a Member State other than the competent State. For instance, are German residents entitled to residence-based benefits in Germany the qualifying conditions of which they meet, while the Netherlands is the competent Member State pursuant to the State-of-employment rule? Applying the principle of exclusivity strictly and provided no exceptions to that principle are relevant, they would be deprived thereof; Article 13(1) Regulation 1408/71 then acts as the sole obstacle to entitlements. However, their entitlements, being based on German law only, deserve protection under the *Petroni* principle. Which principle should prevail in such conflict? The ECJ's position has changed every two decades.

In the mid–1960s, the ECJ understood the principle of exclusivity in a rather flexible way. In the *Nonnenmacher* case, it held that Articles 48 to 51 EEC (now Arts. 45 to 48 TFEU) and the Regulations adopted in implementation thereof "are not opposed to legislation by the Member States designed to bring about additional protection by way of social security for the benefit of migrant workers".[39] Therefore, the principle of exclusivity does not prohibit the application of the legislation of the *non-competent* Member State, "except to the extent that it requires that person to contribute to the financing of a social security institution which is unable to provide him with additional

36. Opinion of A.G. Warner in Case 733/79, *Laterza*, [1980] ECR 1932 and in Case 807/79, *Gravina*, [1980] ECR 2224.

37. See e.g. *Petroni*, cited *supra* note 35 (old-age benefits); Case 50/75, *Massonet*, [1975] ECR 1473 (survivors' benefits); *Manzoni*, cited *supra* note 35 (invalidity benefits); Case 100/78, *Rossi*, [1979] ECR 831 (family benefits); *da Silva Martins*, cited *supra* note 25, para 75 (long-term care benefits/atypical sickness benefits); Case C-193/03, *Bosch*, [2004] ECR I-9911 (sickness benefits *stricto sensu*); Case 79/81, *Baccini*, [1982] ECR 1063 (unemployment benefits). For an account of the current effects of the principle, see Bokeloh, "Das Petroni-Prinzip des Europäischen Gerichtshofes: Inhalt, Entstehungsgeschichte, heutige Bedeutung", (2012) *Zeitschrift für europäisches Sozial- und Arbeitsrecht*, 126–129.

38. E.g. Regulation 1248/92 amending Regulation 1408/71 and Regulation 574/72, O.J. 1992, L 136/7.

39. *Nonnenmacher*, cited *supra* note 30, page 288.

advantages in respect of the same risk and of the same period".[40] The European conflict rules had exclusionary effect if and only if a contribution duty was imposed upon the worker or his employer[41] which was not compensated by additional advantages. Otherwise, the non-competent Member State was bound to apply its legislation and to honour the purely national rights arising thereunder. Competence was not always a prerequisite for entitlement. The *Nonnenmacher* doctrine was confirmed by the 1967 *van der Vecht* case and followed by a string of rather inconclusive decisions.[42] The two landmark cases were based on the predecessor of Regulation 1408/71, Regulation 3/58, which did not contain an express exclusivity rule.[43] In *Nonnenmacher,* the ECJ based its reasoning upon the interpretative problem caused by the absence of such a rule,[44] thereby suggesting that it may have decided otherwise if exclusivity was expressly provided for. When Regulation 3/58 was replaced by Regulation 1408/71, the European legislature unanimously inserted an exclusivity rule in its Article 13(1), which in its original version provided that "[a] worker to whom this Regulation applies shall be subject to the legislation of a single Member State only. That legislation shall be determined in accordance with the provisions of this Title".

The *Ten Holder* judgment confirmed that the legislature had succeeded in its endeavour to root out the *Nonnenmacher* and *van der Vecht* case law. In that case, the ECJ adapted to the new legislative reality. Mrs Ten Holder, resident of the Netherlands, was last employed in Germany, and hence subject to German legislation. When her German sickness benefits expired, she sought to gain access to the Dutch benefits for incapacity for work, which were open for all Dutch residents. As it had done before, the ECJ stressed that the aim of the European conflict rules is to subject a person to the social security scheme of only one Member State. The effect of the European conflict rules is "to divest the legislature of each Member State of the power to determine the ambit and the conditions for the application of its national legislation".[45] The ECJ officially rescinded the *Nonnenmacher* doctrine when it clarified the

40. Ibid., pages 288–289.

41. *van der Vecht*, cited *supra* note 18, page 354.

42. While Case 73/72, *Bentzinger*, [1973] ECR 283 and *Perenboom* (cited *supra* note 11) seemed to amend the *Nonnenmacher* jurisprudence, Case 27/75, *Bonaffini*, [1975] ECR 971, *Massonet* (cited *supra* note 37) and *Jordens-Vosters* (cited *supra* note 34) rather supported it. All lack the clarity to constitute a seminal case.

43. Règlement n° 3 concernant la sécurité sociale des travailleurs migrants, O.J. 1958, 30/561.

44. *Nonnenmacher*, cited *supra* note 30, page 288.

45. *Ten Holder*, cited *supra* note 3, para 21; *Luijten*, cited *supra* note 7, para 14; *Adanez-Vega*, cited *supra* note 13, para 18; *van Delft*, cited *supra* note 25, para 51. See also *Kuijpers*, cited *supra* note 6, para 14; Case C-107/94, *Asscher*, [1996] ECR I-3089, para 61.

relationship between the exclusivity and the *Petroni* principles. The exclusivity rule

"is not at variance with the Court's decisions (see, in particular, . . . Case 24/75 *Petroni* …) to the effect that the application of Regulation No 1408/71 cannot entail the loss of rights acquired exclusively under national legislation. That principle applies not to the rules for determining the legislation applicable but to the rules of Community law on the overlapping of benefits provided for by different national legislative systems. It cannot therefore have the effect, contrary to Article 13(1) of Regulation No 1408/71, of causing a person to be insured over the same period under the legislation of more than one Member State, regardless of the obligations to contribute or of any other costs which may result therefrom for that person".[46]

Thereby, any possibility of a conflict was averted. Indeed, while the principle of exclusivity applies only to the determination of the applicable legislation, the *Petroni* principle governs *everything but* the determination of the applicable legislation; it applies only to the competent Member State. The ECJ implemented the distinction between the competence question and the entitlement question in order to rule out any competence which is not based on Regulation 1408/71. The exclusivity principle does not tolerate exceptions other than those explicitly provided for in the Regulation.[47] The parallel system of social protection called into being by the ECJ in the *Nonnenmacher* case was put to rest in *Ten Holder*. Competence became a condition *sine qua non* for social security rights and duties. Only the competent Member State bears social security responsibilities; all other Member States are prevented from levying contributions and from awarding benefits. As a corollary, the *locus* of social security conflict-of-law rules is solely at the European level; the uniformization of the conflict rules can be cast as an instance of maximum harmonization which leaves no room for the application of national conflict rules. The principle of inviolability of purely national rights can no longer be invoked against Member States lacking competence. The *Ten Holder* case law was repeatedly and unequivocally confirmed by the ECJ[48] and has showed no

46. *Ten Holder*, cited *supra* note 3, para 22 and, with minor alterations, *Luijten*, cited *supra* note 7, para 15. Later case law clarified that the ECJ did not actually confine the *Petroni* principle to "the rules of Community law on the overlapping of benefits provided for by different national legislative systems". See note 37 *supra*.

47. E.g. Arts. 14 and 68 Regulation 883/2004.

48. E.g. *Aldewereld*, cited *supra* note 11; *Commission* v. *France (CRDS)*, cited *supra* note 11; *Commission* v. *France (CSG)*, cited *supra* note 11; *Adanez-Vega*, cited *supra* note 13, para 18.

signs of weakness until recently.[49] In *Vogler*, a challenge to the validity of the exclusivity principle on the grounds of the principles of subsidiarity and proportionality was deemed unworthy of a judgment by the ECJ, who, due to the absence of room for reasonable doubt, instead resorted to a decision by reasoned order to dismiss it. The rule laid down in Article 13(1) Regulation 1408/71 is now enshrined in Article 11(1) Regulation 883/2004.[50]

This episode of coordination history forms the background to the recent case law. It shows that the exclusivity principle and a new system of social protection for migrants under the legislation of the non-competent Member State are two sides of the same coin. Only the strictest principle of exclusivity is able to avoid such parallel systems. While it seems that in its recent case law the ECJ does not resort to old solutions by reviving the *Nonnenmacher* doctrine, a definite answer is lacking and, in any case, the ECJ faces old problems. Besides, this historical perspective sheds light on the *raison d'être* of Article 13(1) Regulation 1408/71: the European legislature intended to rule out the nascent plurality of applicable legislation.

2. The creation of a voluntary system of social protection for migrants

In a series of cases, the most striking of which are discussed in the following paragraphs, the ECJ shifted the paradigm: by narrowing the reach of the principle of exclusivity, it opened the door for the creation of an additional layer of social security rights for migrants under the legislation of Member States lacking competence.

49. The ECJ introduced some plurality of applicable legislation in the field of family benefits, which was reduced, but not revoked, after *Ten Holder* (e.g. *Laterza*, cited *supra* note 36; *Gravina*, cited supra note 36; Case C-59/95, *Bastos Moriana*, [1997] ECR I-1071). As regards health care benefits in kind, *Vanbraekel* could be considered as imposing duties upon a Member State which, while competent *in abstracto*, is not competent *in concreto* (Case C-368/98, *Vanbraekel*, [2001] ECR I-5363). Finally, in *Van der Duin* (Case C-156/01, *Van der Duin*, [2003] ECR I-7045, paras. 41–42), *Vanbraekel* (paras. 36–37) and *Bosch* (cited *supra* note 37, para 21), the ECJ incidentally hinted at an idea which it would bring to fruition in *Bosmann* (cited *supra* note 3). Besides, European law does not preclude Member States from levying social charges on undertakings established in their territory with respect to self-employed persons insured elsewhere whose work they market, insofar as the self-employed persons are not affected by such contributions (Case C-68/99, *Commission* v. *Germany (artists and journalists)*, [2001] ECR I-1865). Without downplaying their importance, it must be said that all these cases fall short of setting a standard which could reverberate across the whole Regulations and fundamentally alter the legal position of the non-competent State.

50. Its "great importance" is underlined in recital 18a in the preamble to Regulation 883/2004.

2.1. *Bosmann*

Mrs Bosmann, a single mother, resided with her children in Germany.[51] In her capacity of resident, she enjoyed German child benefits. When she took up employment in the Netherlands, she lost all entitlement to child benefits. The Dutch legislation, which became applicable as the *lex loci laboris*, did not provide for such benefits to be granted to children aged over 18. The German child benefits were discontinued on the sole basis of the principle of exclusivity: since the Netherlands is the competent Member State and none of the exceptions to Article 13(1) apply to the facts of the case, German legislation cannot apply. The referring court sought to ascertain whether European law allows Germany to deny Mrs Bosmann a benefit to which she was entitled on the basis of German law only, when no equivalent title arises in the competent Member State.

The approach of Advocate General Mazák reflects and underpins the *Ten Holder* orthodoxy.[52] Article 13(2)(a) Regulation 1408/71 vested competence in the Member State of employment, i.e. the Netherlands, despite the fact that both Mrs Bosmann and her children[53] resided in Germany. Since the more specific conflict rules laid down in Article 76 Regulation 1408/71 and Article 10 Regulation 574/72, both of which may result in a transfer of competence to the Member State of residence, were not applicable, her situation was governed by Dutch social security legislation only. The Advocate General used the distinction between the question of competence and the question of entitlement to argue that such outcome accords with the Regulation and the TFEU. The origin of the problem is not a matter of competence, but rather one of entitlement: the Dutch legislation did not provide for benefits for adult children. While a lack of competence is prohibited by the strong effect of the conflict rules, *Ten Holder* demonstrates that a lack of entitlement under the legislation of the competent Member State can be lawful. The Advocate General relied on the case law stating that the choice for coordination rather than harmonization entails that those restrictions to free movement which merely flow from the disparities between social security systems of the Member States do not impinge upon the free movement rights enshrined in the Treaty. This was the case, because the source of the disadvantage which Mrs Bosmann experienced lay in the substantive differences between the German and the Dutch child benefits regarding age limits. The allegation of discrimination could not be substantiated for lack of differential treatment:

51. *Bosmann*, cited *supra* note 3; see Van der Mei and Essers, Annotation to Case C-352/06, Bosmann, (2009) CML Rev., 959–972.

52. Opinion of A.G. Mazák in *Bosmann*, cited *supra* note 3.

53. Art. 73 Regulation 1408/71.

since the assessment of discrimination takes place within the framework of the competent Member State, Mrs Bosmann must be compared to all other workers employed in the Netherlands, who are not entitled to Dutch child benefits in respect of their adult children either. In sum, European law was of no avail to Mrs Bosmann.

The Grand Chamber of the ECJ first showed commitment to the principle of exclusivity and to the *lex loci laboris* rule. It then established that the specific conflict of laws rules, which organize a limited duplication of family benefits, were not applicable to the facts of the case. Hence, Mrs Bosmann's situation was governed by Dutch legislation. The ECJ reversed its prior case law, and held that:

"It follows that Community law does not require the competent German authorities to grant Mrs Bosmann the family benefit in question. However, neither can the possibility of such a grant be excluded, because, as is clear from the contents of the file submitted to the Court, it is apparent that, under the German legislation, Mrs Bosmann may be entitled to child benefit solely because of her residence in Germany, which is for the national court to determine".[54]

The ECJ clarified its motives by deriving from Article 48 TFEU the rule that "migrant workers must not lose their right to social security benefits or have the amount of those benefits reduced because they have exercised the right to freedom of movement conferred on them by the Treaty".[55] It found further support in the first recital in the preamble to Regulation 1408/71 which embeds coordination within the framework of free movement of workers and postulates that it should "contribute towards the improvement of their standard of living and conditions of employment". Therefore, "the Member State of residence cannot be deprived of *the right* to grant child benefit to those resident within its territory".[56]

The *Bosmann* judgment inaugurated a parallel system of social security coordination. The traditional coordination system is accessed through the European conflict rules. Unless provisions of the Regulation provide otherwise, the legislation of only one Member State applies at any given point in time, to the extent that it complies with the rules of the Regulation and, to a certain degree, the TFEU. In *Bosmann*, the ECJ unlocked the gate to another system, which concerns each Member State under whose legislation, taken in isolation, entitlement to social security benefits arises. The lack of competence no longer always precludes entitlement. As is exemplified by the

54. *Bosmann*, cited *supra* note 3, paras. 27–28.
55. Ibid., para 29.
56. Ibid., para 31, emphasis added.

Kohll line of case law,[57] new regimes such as the one created in *Bosmann* have two existential needs: consolidation and fine-tuning, i.e. the broadening and/or narrowing of the reach of a doctrine formulated in a seminal judgment in later case law.[58] Member States can be somewhat reluctant and/or slow to internalize new interpretations of European law with which they disagree, in particular when they occasion additional welfare burdens. Since the issues surrounding the *Petroni* principle were described as "perhaps the most controversial aspect" of international social security law[59] and generated resistance amongst the Member States and the European institutions alike, culminating in the German authorities' idea to amend the EC Treaty,[60] an isolated judgment, even if pronounced in Grand Chamber, which applies that principle to the *non-competent* Member State is unlikely to overcome this relative inertia.[61] Besides, the scope of the new regime requires demarcation. Which Member States must open their social security systems, and which States escape social security responsibility? Several elements of the *Bosmann* case could limit its scope, and it is the task of both the ECJ and observers to sift out the trivial factors. The *Hendrix*, *von Chamier-Glisczinski*, *Hudzinski and Wawrzyniak* and *Commission* v. *Germany (long-term care benefits)* judgments cater for those needs.

2.2. *Von Chamier-Glisczinski and Commission v. Germany (long-term care benefits)*

The risk of reliance on care, which was ignored by the European welfare States until relatively recently, does not figure amongst the risks covered by the Regulation. The ECJ categorized long-term care benefits as "sickness benefits" within the meaning of Article 4(1)(a) Regulation 1408/71.[62] The Regulation distinguishes between sickness benefits in kind and in cash.[63]

57. Some 15 years after the publication of the seminal *Kohll* and *Decker* judgments, preliminary questions are still asked, infringement proceedings are still launched and legislative action is undertaken in order to determine their precise implications and to enforce them; Case C-158/96, *Kohll*, [1998] ECR I-1931; Case C-120/95, *Decker*, [1998] ECR I-1831; Directive 2011/24; see Obermaier, *The End of Territoriality? The Impact of ECJ Rulings on British, German and French Social Policy* (Ashgate, 2009).

58. Obermaier, op. cit. *supra* note 57, p. 3, note 5.

59. Forde, "The vertical conflict of social security laws in the European Court", (1980) LIEI, 23.

60. Bokeloh, op. cit. *supra* note 37, 124 and 126 and Forde, op. cit. *supra* note 59, 57. The principle is now widely accepted (Bokeloh, 129).

61. See also Golynker, "Coordination of social security schemes in the European Union: The Rashomon effect in Bosmann", (2009) *Journal of Social Security Law*, 73.

62. Case C-160/96, *Molenaar*, [1998] ECR I-843, paras. 21–25.

63. See *von Chamier-Glisczinski*, cited *supra* note 25, para 48 and the case law cited.

Only the latter must be exported by the competent Member State to the Member State of stay or residence. Under certain conditions, benefits in kind are served by the institution of the place of residence or, as the case may be, the place of stay, in accordance with its own legislation and on behalf of the competent institution, which bears the costs. The competence with respect to care benefits in kind is thus spread over the Member State of stay or residence, which should grant such benefits, and the competent Member State, which remains in charge of all other aspects, including e.g. the collection of contributions. The consequences for dependent persons of this coordination on the basis of the rules on sickness benefits can be harsh when the Member State of residence or stay offers less advantageous care benefits in kind in terms of amount, duration or qualifying conditions or does not provide for such benefits at all.

Despite moving from Germany to Austria, Mrs von Chamier-Glisczinski remained subject to German legislation. As she did not qualify for Austrian care benefits in kind, she asked the German authorities to bear the costs of her stay in a specialized care home in Austria; the German institution rejected that request on the ground that the full in-patient care benefit is a non-exportable benefit in kind, and instead granted her a lower cash benefit.

The ECJ found that the provisions on sickness benefits designated Austria as responsible for granting care benefits in kind in accordance with its own legislation. Where Austria does not provide for such benefits, the Regulation cannot be relied upon to compel Germany to award its benefits in kind outside its boundaries. The ECJ went on to observe that the European conflict rules do not *prevent* Germany from granting such benefits nonetheless.[64] A German provision however suspends the right to care benefits in kind during periods of stay or residence abroad. In its answer to the second question, the ECJ proceeded to test the validity thereof in the light of the free movement rights of citizens. It first emphasized the powers of the Member States in matters of social security law and the wide discretion enjoyed by the authors of the Regulation, whose regulatory choices regarding the provision of sickness benefits in kind are legitimate. Admittedly, seen through the lens of Article 18(1) EC (now Art. 21(1) TFEU), the non-export places persons such as Mrs von Chamier-Glisczinski in a situation less favourable than if she stayed in a care home in Germany. The ECJ nevertheless considered it to comply with the right to free movement under Article 18(1) EC. Her unfortunate legal position was merely the outcome of the application of lawful provisions of the Regulation, which provides for the coordination and not the harmonization of the social security legislation of the Member States. Article 42 EC (now Art. 48 TFEU) tolerates both the disparities between the social security systems of

64. Ibid., paras. 55–56.

the Member States and the disadvantages which can result therefrom. The lack of entitlement suffered by Mrs von Chamier-Glisczinski flowed rather from the disparities between German and Austrian legislation on the risk of reliance on care than from the German residence condition alone. Given the powers of Germany and Austria in shaping their sickness insurance schemes,

"one of those schemes cannot be considered to be the cause of a discrimination or a disadvantage for the sole reason that it has unfavourable consequences when it is applied, in accordance with the coordination mechanisms laid down in application of Article 42 EC [now Article 48 TFEU], in combination with the scheme of another Member State".[65]

This is wholly in line with the *Bosmann* judgment. By respecting the German residency condition, the ECJ confirmed the optional nature of the new regime of social security coordination: the limitation of *Bosmann* to purely national rights does not as such contravene Article 21(1) TFEU. Besides, the ECJ clarified that the *Bosmann* mechanism also covers long-term care benefits. *Von Chamier-Glisczinski* also extends *Bosmann* in two directions. Where the defendant institution in *Bosmann* belonged to a Member State lacking all competence, Germany was in principle competent for Mrs von Chamier-Glisczinski's social security position, were it not that a provision of the Regulation carved out an exception to that competence in respect of care benefits in kind; *Bosmann* can affect the competent Member State inasmuch as a provision of the Regulation delegates part of its competence to another State. Provided the *Bosmann* conditions are fulfilled, a person residing or staying outside the competent Member State could thus apply for sickness benefits in cash in his or her Member State of residence or stay. The ECJ also made clear that the *Bosmann* mechanism can apply to Member States other than the State of residence.

In *Commission* v. *Germany (long-term care benefits)*, the Commission attempted to bring long-term care benefits within the scope of the *Kohll* line of case law.[66] In particular, it alleged that the German refusal to export certain non-hospital care benefits in kind beyond the situations envisaged in the Regulations contravened the freedom to provide services. As Germany was not competent in that particular respect and its legislation contained a residence condition, the Commission effectively requested the ECJ to waive the German opt-out. The ECJ concluded that the Commission had failed to substantiate its claims. It based that finding on the particular nature of care benefits as opposed to typical sickness benefits, the burden of proof resting on the Commission in infringement procedures, the validity and effect of the

65. Ibid., para 87.
66. *Commission* v. *Germany (long-term care benefits)*, cited *supra* note 25.

relevant provisions of the Regulation and the neutrality of EU social security law. The ruling confirms and generalizes *von Chamier-Glisczinski*.

2.3. *Hendrix*

In *Hendrix*, the existence of a purely national right depended entirely on the exercise of discretionary powers by the institutions of a Member State that used to be competent.[67] Mr Hendrix was entitled to a Dutch benefit for young disabled persons suffering from long-term incapacity for work; when he moved to Belgium, the Dutch authorities terminated the payment of the benefit. The coordination of special non-contributory cash benefits (hereinafter "SNCBs") is based on two intertwined rules: the Member State of residence is solely competent (the competence rule) and SNCBs are served only in that Member State (the non-export rule).[68] The ECJ focused on the latter rule and proceeded to examine the compliance of the Dutch non-export rule with the Treaty provisions on the free movement of workers. A provision of Dutch law vested discretionary powers in the administration to waive the residence requirement when ending the benefit would entail an "unacceptable degree of unfairness". The ECJ instructed the national court to interpret this hardship provision in accordance with the requirements of European law and the principle of proportionality, and in particular to take account of the circumstance that Mr Hendrix had exercised his right of freedom of movement as a worker and had kept all his economic and social links to the Netherlands.

Seen in the light of the competence rule, *Hendrix* tells us something significant about *Bosmann*. By taking up residence in Belgium, Mr Hendrix triggered a change in the applicable legislation.[69] The Netherlands could have turned down the claim on the ground that only Belgium was competent with regard to SNCBs. The underlying question was thus whether Mr Hendrix could gain access to the benefits of a Member State lacking competence. Whether he was protected by the *Bosmann* mechanism – which had yet to be articulated –[70] was contingent upon the hardship clause: only if the residence condition was waived would he enjoy purely national rights despite his move abroad. By strongly hinting that the national court should waive it, the ECJ established a duty to interpret discretionary powers in such a way as to create entitlement to purely national rights under the legislation of the

67. *Hendrix*, cited *supra* note 30.

68. Art. 10a Regulation 1408/71; Art. 70 Regulation 883/2004.

69. The ECJ assumed that Mr Hendrix resided in Belgium within the meaning of Art. 1(h) Reg. 1408/71.

70. The seeds were planted in *Van der Duin*, cited *supra* note 49, para 41.

non-competent Member State, at least in circumstances where the claimant can demonstrate the existence of a strong link with that State.

2.4. *Hudzinski and Wawrzyniak*

Mr Hudzinski worked as a self-employed farmer in Poland, where he and his children resided. Availing himself of the possibility for the posting of self-employed persons opened by Article 14a(1)(a) Regulation 1408/71, he performed employed work as a seasonal worker in a German horticultural business during three and a half months. He claimed German child benefits for that period, during which neither he nor his wife seem to have received Polish family benefits. Mr Wawrzyniak was in a similar situation. He resided in Poland with his wife and their daughter. His employer posted him to Germany from February to December 2006 under Article 14(1)(a). While his wife was in receipt of Polish child benefits amounting to approximately €12 per month, he applied for the payment of German child benefits of €154 a month. Since it was uncontested that Poland, and not Germany, was the competent Member State, both applicants in the main proceedings relied upon the *Bosmann* ruling to sustain their claims. German legislation granted child benefits not only to German residents, as was the case in *Bosmann*, but also to persons subject to unlimited income tax liability under German law or treated as such, which both claimants in the main proceedings were. The referring court discerned four differences between the pending case and the *Bosmann* judgment and hence entertained serious doubts as to whether that judgment could be applied to the facts of the case.

The ECJ, sitting in Grand Chamber, first demonstrated allegiance to the very cornerstones of social security law, from which it would later depart to a certain extent. After describing the exclusivity principle as part of "settled case law",[71] it held that Article 48 TFEU does not affect substantive and procedural differences between the social security systems of the Member States, emphasizing the powers of the Member States in that regard.[72] Accordingly,

> "the primary law of the European Union cannot guarantee to an insured person that moving to another Member State will be neutral in terms of social security. Thus, the application, possibly under the provisions of Regulation No 1408/71, following a change of Member State of residence, of national legislation that is less favourable as regards social security benefits may in

71. *Hudzinski and Wawrzyniak*, cited *supra* note 1, para 41.
72. Ibid., para 42.

principle be compatible with the requirements of primary EU law on freedom of movement for persons".[73]

This shields the European conflict rules from a *direct* challenge. Thus, only the Polish legislation is applicable pursuant to Regulation 1408/71, even if the Polish benefits are less favourable than their German counterparts.[74]

The ECJ then extensively cited the *Bosmann* case, and ascertained whether it could be applied to the facts of the case. The ECJ consolidated the *Bosmann* case, largely in the fashion suggested by the Advocate General. The first question was probably caused by a statement in *Bosmann* to the effect that the loss of benefits, the origins of which remain unspecified, due to the exercise of the right to freedom of movement, is prohibited. In *Hudzinski and Wawrzyniak* the ECJ made clear that the fact that migration was not prejudicial to the appellants in the main proceedings[75] does not prevent the *Bosmann* rule from applying. *A fortiori*, a complete loss of benefits is not required.[76] Thereby the ECJ also accepted that *Bosmann* might be called into play even when an entitlement to comparable benefits is retained in the competent Member State,[77] which raises the prospect of an overlapping of benefits. Previously, one could have argued that *Bosmann* only vests competence in a State when no corresponding benefits are received in the competent Member State, resulting in a single, but different applicable legislation for a particular benefit.

The second point of contention in the *Hudzinski and Wawrzyniak* cases concerned the connecting factor. In *Bosmann*, Germany was held liable because child benefits were open to all parents resident in Germany. Asked whether this was a *sine qua non* condition for the *Bosmann* rule, the ECJ acknowledged that the residence of the parents and children are "specific and particularly close connecting factors".[78] However, the fact of subjection to unlimited income tax liability, which constitutes the basis for entitlement in the *Hudzinski and Wawrzyniak* cases, is "based on a precise criterion and may

73. Ibid., para 43.

74. Ibid., para 44.

75. The Hudzinski family does not seem to have been in receipt of any child benefits before or during the period of posting. Mr Wawrzyniak's wife received child benefits, which remained constant before and during that period.

76. See Golynker, op. cit. *supra* note 61, 69–70.

77. The ECJ had previously generated some confusion by applying *Bosmann* under the condition that "the legislation of the [Member State of residence, which is competent in that respect] does not provide for the grant of benefits in kind covering the risk in respect of which entitlement to such benefits is claimed" (*von Chamier-Glisczinski*, cited *supra* note 25, para 55. See also Opinion of A.G. Mengozzi in that case, paras. 51 and 55; Lhernould and Martin, "Versement transfrontalier de prestations de dépendance: L' 'axiome Bosmann' revisité: Annotation to Case C-208/07, von Chamier-Glisczinski", (2009) *Revue de Jurisprudence sociale*, 791–792; van der Mei and Essers, op. cit. *supra* note 51, 966).

78. *Hudzinski and Wawrzyniak*, cited *supra* note 1, para 65.

be regarded as being sufficiently close, when account is also taken of the fact that the family benefit claimed is financed by tax revenue".[79] The ECJ effectively broadens *Bosmann* to all situations in which a family benefit is awarded under national law only, irrespective of the domestic connecting factor;[80] the ECJ's reference to precision and closeness draws very remote limits. The fact that the ECJ allotted competence to the Member State of residence in the *Bosmann* judgment leads to the question whether it could be read as an indicator of a more general shift from the *lex loci laboris* to the *lex loci domicilii*.[81] It was plain already in *Bosmann* that this flowed merely from the German reliance upon residence as a connecting factor, rather than an underlying policy agenda of the ECJ to do away with the *lex loci laboris*, and the *von Chamier-Glisczinski* and *Hudzinski and Wawrzyniak* cases have the merit of clarifying this. In practice, however, the new regime will more often than not concern the Member State of residence.[82]

This broadening of *Bosmann* did not suffice to grant the benefits to Mr Wawrzyniak. The answer to the last two questions of the *Wawrzyniak* case is set out below.

2.5. *The rationale and scope of the Bosmann mechanism*

Bosmann was ostensibly based on the idea that Article 42 EC (now 48 TFEU) entails that "migrant workers must not lose their right to social security benefits or have the amount of those benefits reduced because they have exercised the right to freedom of movement conferred on them by the Treaty".[83] Without specification that the benefits in question were rooted in national law only, which *in casu* they were, the statement can at best be considered as an illegitimate child of the *Petroni* principle and yields doubts

79. Ibid., para 66.

80. See also *Van der Duin*, cited *supra* note 49; *Hendrix*, cited *supra* note 30; *von Chamier-Glisczinski*, cited *supra* note 25.

81. See Babayev, "Exploring the fate of the lex loci laboris rule and its exclusive effect under Regulation 883/2004: Annotation to Case C-352/06, Bosmann", (2011) *European Journal of Social Law*, 84–85 and 88; Golynker, op. cit. *supra* note 61, 70–73.

82. That is not due to a theoretical link with that Member State, but merely results from the combined effect of the prevalence of the *lex loci laboris* under the Regulation and the relative popularity of the *lex loci domicilii* amongst Member States. Since most persons with connections to more than one State are insured in their Member State of employment, the non-competent Member State most likely to provide them benefits under the new regime is that in which they reside.

83. *Bosmann*, cited *supra* note 3, para 29.

about its implications.[84] Mrs von Chamier-Gliszczinski lost her entitlement to care benefits in kind for the sole reason of exercising her right of free movement as an economically inactive citizen. The ECJ's refusal to uphold her claim is in line with the *Petroni* principle – since she enjoyed no rights under German law alone – but not with the stated rationale of *Bosmann* quoted above. The *Hudzinski and Wawrzyniak* cases have the merit of lifting any remaining doubt by grounding the new regime in the *Petroni* principle.[85] The ECJ explained that the statement in *Bosmann* is merely exemplary. It is only one expression of the idea that the coordinating Regulations should be interpreted in the light of the objective of Article 48 TFEU, which is "to contribute to the establishment of the greatest possible freedom of movement for migrant workers";[86] as stated by its first recital, Regulation 1408/71 aims to improve the standard of living and conditions of employment of migrant workers. Consequently, the rationale for the choice of the non-competent Member State lies not in the prevention of loss of entitlements due to migration, but in the protection of rights "granted solely by virtue of the legislation of a single Member State".[87] This passage firmly anchors the new regime of social protection to the principle of inviolability of purely national rights. Confronted with the perennial dilemma whether or not to pre-empt more favourable national legislation of a Member State lacking competence, the ECJ again changed its mind: the *Petroni* principle *does* take precedence over the exclusivity principle.[88] The holding in *Ten Holder* and *Luijten* to the effect that the *Petroni* principle does not apply to the European conflict rules and thus shields only purely national rights under the legislation of the *competent* Member State is largely revoked. In *Bosmann*, the ECJ offered a distinction from *Ten Holder* and *Luijten* which virtually all commentators found unconvincing.[89] *Ten Holder*, the ECJ held, concerned a refusal by the authorities of the competent Member State to award a benefit. The truth is that, in both cases, the defending institution belonged to a Member State other than the competent State. While Mrs Ten Holder failed to meet the conditions for

84. Lhernould, Annotation to Case C-352/06, Bosmann, (2008) *Revue de droit sanitaire et social*, 988; Kessler, "Prestations familiales: Une nouvelle remise en cause du principe d'unicité de la législation applicable: Annotation to Case C-352/06, Bosmann", (2008) *Revue de Jurisprudence sociale*, 772.

85. *Hudzinski and Wawrzyniak*, cited *supra* note 1, paras. 51–57.

86. Ibid., para 53.

87. Ibid., para 56.

88. See also Devetzi, "Von 'Bosmann' zu 'Hudzinski' und 'Wawrzyniak': Deutsches Kindergeld in Europa", (2012) *Zeitschrift für europäisches Sozial- und Arbeitsrecht*, 447.

89. Babayev, op. cit. *supra* note 81, 79–81; Bokeloh, op. cit. *supra* note 37, 126; Cousins, "Overview of recent cases before the European Court of Human Rights and the European Court of Justice (March – May 2008)", (2008) *European journal of Social Security* (EJSS), 167; Van der Mei and Essers, op. cit. *supra* note 51, 694. See also Golynker, op. cit. *supra* note 61, 68–69.

entitlement under national law, Mrs van Vermoolen, née Luijten, did hold a purely national right which would have been worthy of protection under *Bosmann*. As will be explained below, *Ten Holder* may keep its whole significance with regard to the ability of the State lacking competence to levy contributions. The *Petroni* principle and the doctrine of pre-emption give a solid constitutional basis to the new regime of coordination, allowing the otherwise valid arguments of Advocate General Mazák to be outweighed. Since the *Petroni* principle is part of primary law, it is an adequate basis for interpreting a provision of secondary law against its letter and spirit and thereby carving an exception to the prevailing neutrality of EU social security law.[90] The *Petroni* principle mitigates neutrality by setting a floor of protection; by extending that principle to the competence question, the ECJ makes proper use of the Treaty and national law to ease some detrimental effects of neutrality. Moreover, while it is true that the disadvantage Mrs Bosmann incurred flowed merely from the disparities between the German and Dutch legislation, the ECJ in *Hudzinski and Wawrzyniak* clarified that that disadvantage is strange to its reasoning.

This rationale allows one to draw a couple of conclusions. The *Bosmann* procedure can be described as follows. Member States lacking competence must henceforth apply their social security legislation in full to any uninsured person who requests it. Unlike their competent counterpart, they apply *only* their domestic legislation, leaving aside any provision of primary or secondary EU legislation, including the principle of exclusivity enshrined in Article 13(1) Regulation 1408/71 and Article 11(1) Regulation 883/2004. If an entitlement to social security benefits accrues from national law only, and that is a matter for the national court to decide,[91] then *Bosmann* requires that benefit to be paid. Otherwise, the non-competent State escapes social security duties.

The case law to date concerns family benefits, care benefits in kind and SNCBs. In *van der Duin*, the ECJ suggested it also applies to classic sickness benefits in kind.[92] *Bosmann* is at the intersection of the principle of inviolability of purely national rights and the exclusivity principle, both of which apply across the board of the Regulation. Therefore, the *Bosmann* regime in principle covers all social security benefits within the meaning of

90. See also Eichenhofer, Annotation to Case C-352/06, Bosmann, (2008) *Zeitschrift für europäisches Sozial- und Arbeitsrecht*, 460. Contra: Opinion of A.G. Mazák in *Bosmann*, cited *supra* note 3, paras. 67–82; Babayev, op. cit. *supra* note 81, 81–82; Kessler, op. cit. *supra* note 84, 772.

91. *Bosmann*, cited *supra* note 3, paras. 28, 36 and 37.

92. *Van der Duin*, cited *supra* note 49, para 41, which indicates that the *Jordens-Vosters* case (cited *supra* note 34) was not overruled by *Ten Holder* (cited *supra* note 3). See also *Vanbraekel*, cited *supra* note 49, paras. 36–37 and *Bosch*, cited *supra* note 37, para 21.

those regulations.[93] That is not to say that it cannot be modulated according to the particularities of certain benefits and situations, and in particular the method of funding. Since the *Petroni* principle tolerates "express exception[s] consistent with the aims of the Treaty,"[94] the European legislature has a limited licence to derogate from it. The ECJ will have to clarify whether such exceptions exist and whether *Bosmann* overrules cases in which it previously ruled out the application of the legislation of the non-competent Member State.[95]

The practical impact of the *Bosmann* mechanism should not be underestimated. The slightest divergence between the conflict rules of the Regulation on the one hand, and, on the other, those of a Member State other than the State which is competent according to the Regulation opens the prospect of a *Bosmann*-type competence. The number of combinatorial possibilities is huge. Take a worker who is posted from Member State A to Member State B. The legislation of State A will apply according to Article 12(1) Regulation 883/2004. In State B, he may well meet the domestic definition of an "employed person" and thereby become entitled to those benefits which are open only to economically active persons. If he stays in host State B for the duration of the posting, he might be considered a resident, which would give him access to residence-based benefits. Supposing the worker is habitually resident in a third Member State C, he would probably gain access to that State's residence-based benefits. In the field of family benefits, this exercise should be iterated for both parents or guardians. Moreover, as the German legislation at issue in *Hudzinski and Wawrzyniak* illustrates, States use criteria other than residence or economic activity to delineate their social security benefits. Divergences between national and European conflict rules are widespread, and hence a substantial number of migrants should be able to clear the first hurdle to gain access to benefits by

93. Babayev, "Equal treatment on the grounds of movement and Union choice-of-law rules under Article 81 TFEU", (2012) MJ, 74; Jorens, et al., "Towards a new framework for applicable legislation: New forms of mobility, coordination principles and rules of conflict", (2008) *trESS Think Tank Report*, available at: <www.tress-network.org/tress2012/EUROPEAN%20RESOURCES/EUROPEANREPORT/ThinkTank_Mobility.pdf> [last visited 13 Feb. 2013], 26–27 and 34; Jorens, "Towards new rules for the determination of the applicable legislation?" in Jorens (Ed.), *50 years of Social Security Coordination: Past – Present – Future* (Publications Office of the European Union, 2010), p. 185; Van der Mei and Essers, op. cit. *supra* note 51, 966.

94. *Rossi*, cited *supra* note 37, para 14; *Laterza*, cited *supra* note 36, para 8; *Gravina*, cited supra note 36, para 7; Case 320/82, *D'Amario*, [1983] ECR 3811, para 4; Case C-16/09, *Schwemmer*, [2010] ECR I-9717, para 58; *da Silva Martins*, cited *supra* note 25, para 75; *Hudzinski and Wawrzyniak*, cited *supra* note 1, para 56.

95. E.g. *Ten Holder*, cited *supra* note 3; *Miethe*, cited *supra* note 20; *Luijten*, cited *supra* note 7.

demonstrating some connection to one or more non-competent Member States, at least with regard to certain branches of social security.

The determination of the international field of application of national social security schemes is a core task of international social security law at national, European and international level. By depriving the European legislature of some powers in that regard, the ECJ devolves them to the Member States, who recover the power to open up their social security systems to uninsured persons – an ability which they had relinquished by (unanimously) enacting Article 13(1) Regulation 1408/71. *Bosmann* clarifies that a mere invocation of Article 13(1) Regulation 1408/71 by the executive and judiciary bodies of the Member States is inadequate.[96] This inadequacy, again, flows from the *Petroni* principle: since Article 13(1) cannot corrode purely national rights, reliance upon it is futile. The diminished effectiveness of the Regulation can be, but is not necessarily, absorbed by the Member States, who now face a choice.

Member States might feel responsible for persons who, despite being compulsorily insured in another Member State, are still considered by them as part of their solidaristic community. The most obvious groups are pensioners who spent a substantial part of their career in a State before emigrating, and frontier workers. EU social security law can have very severe effects on the rights of individuals. Some well-known problems, both pan-European and country-specific, cannot realistically be solved at the European level in the short term. Member States might thus consider addressing some drawbacks through their national legislation, by granting compensating benefits to uninsured persons. A.P. van der Mei and G. Essers give the example of the Belgian "internal" frontier worker pension, which tops the foreign pension of persons residing in Belgium up to the level of a fictional Belgian pension representing the amount which the pensioners would have built up if they had only worked in Belgium.[97] While such action furthers the free movement of persons, it formally breached European law.[98] Even if the likelihood of judicial procedures was low, this constituted a disincentive for such largesse on the part of concerned national legislators.[99] By incentivizing it, *Bosmann* contributes to addressing outstanding social needs.

96. Contra: Hermans, "Woonland mag kinderbijslag toekennen, ook al is ander land aangewezen als de bevoegde staat: Annotation to Case C-352/06, Bosmann", (2008) *Nederlands tijdschrift voor sociaal recht*, 226–227.

97. Van der Mei and Essers, op. cit. *supra* note 51, 966.

98. Voluntary insurance could solve only a limited number of these problems, given the constraints of Art. 15 Regulation 1408/71 and Art. 14 Regulation 883/2004.

99. The extent to which Member States voluntarily granted benefits to uninsured persons prior to *Bosmann* is unknown (Coucheir et al., "The relationship and interaction between the coordination Regulations and Directive 2004/38/EC", (2008) *trESS Think Tank Report*,

In other situations, Member States may want to avoid being held liable to grant benefits. They can erect a defensive wall by tailoring their national legislation so as to exclude persons for whom they are not competent according to the Regulation, and those persons alone. The example of child benefits might be instructive, since the basic internal qualifying conditions (i.e. those which are unrelated to the international field of application) are the existence of a familial link between the child and the entitled person and the age of the child. Measures such as lowering the age limit for child benefits would be successful in excluding Mrs Bosmann, but would come at the price of over-inclusiveness, also affecting many persons compulsorily insured in Germany, and under-inclusiveness, since many uninsured parents of young children might still be able to assert purely national rights. These Member States should therefore focus on the rules delineating the international field of application of their legislation, i.e. their external conditions. As regards the question of competence, a State can reject competence when another Member State is competent pursuant to the Regulation through a national exclusivity rule.[100] Such a rule could read "benefit shall be granted to all persons resident in Germany or liable to income tax there, except those to whom, on the basis of the rules governing the law applicable under Regulation 1408/71, the social security law of another Member State of the European Union or of another State party to the European Economic Area applies as of right".[101] As *Von Chamier-Glisczinski* and *Commission* v. *Germany (long-term care benefits)* illustrate, the same effect can be obtained by replicating the European rules in the national legislation.[102] As to the question of entitlement, a State can rule out entitlement to its benefits when similar foreign benefits are received according to the Regulation by enacting or maintaining a national rule against the overlapping of benefits. Subparagraph (1) of paragraph 65 of the *Einkommensteuergesetz* (German federal law on income tax hereafter

available at: <www.tress-network.org/tress2012/EUROPEAN%20RESOURCES/EUROPEANREPORT/ThinkTank_Residence.pdf> [last visited 19 March 2013], 8).

100. The strong effect of the determination of the applicable legislation prohibits the *competent* Member State from enforcing a national exclusivity rule (*Kuijpers*, cited *supra* note 6). National anti-overlapping rules can be applied by the competent Member State only in so far as that is allowed by the Regulation.

101. The confidence of Hermans (op. cit. *supra* note 96, 227) about the respect of the ECJ for such rules is not wholly shared by other commentators (Jorens et al., op. cit. *supra* note 93, 26; Jorens and Van Overmeiren, "General principles of coordination in Regulation 883/2004", (2009) EJSS, 75; Jorens, op. cit. *supra* note 93, 184–185. See also Van der Mei and Essers, op. cit. *supra* note 51, 966–969).

102. Insofar as the national conflict rules of a Member State are identical to the European conflict rules, they rule out the existence of purely domestic entitlements when that State lacks competence.

"EStG"), at issue in the second part of *Hudzinski and Wawrzyniak* and examined below, belongs to that category.

The delivery of *Bosmann* in spring 2008 thus opened a period of transition. Each Member State should decide whether and to what extent it wants to open its social security schemes to persons who are insured in another Member State and undertake the necessary steps to translate its wish into law.

Bosmann does generate overlapping of benefits. Since it leaves Member States with an escape route and does not compel persons to pay social security contributions to a Member State which lacks competence, it does not engender the complications which the exclusivity principle aims to avoid.[103]

The interaction between the traditional and new coordination systems is very limited, since by definition they concern different Member States; in that sense they are truly parallel. The traditional system is compulsory, while the reach of the new system inaugurated in *Bosmann* is coterminous with the goodwill – or lack of foresight – of the Member States.

3. From possibility to duty?

Given the doctrine of pre-emption which underlies *Bosmann* and *Petroni*, both judgments protect only purely national rights. Any interference of European law in the social security affairs of the non-competent Member State would not only lift this boundary, but moreover curb the freedom of choice of the non-competent Member State. Those Member States who do not wish to partake in the new system should demonstrate that no purely national entitlement to social security benefits arises under its legislation; the rules preventing entitlement are beyond review by the ECJ. Not only did the ECJ emphasize this limit repeatedly,[104] it moreover resisted attempts to turn this option into an obligation in the *Van der Duin*,[105] *von Chamier-Glisczinski* and *Commission* v. *Germany (long-term care benefits)* cases. Recently, however, the ECJ yielded to the demands of a claimant: a rule on the international field of application of the social security system of a State lacking competence was lifted for it contravened the principle of proportionality, as understood in the case law on Union citizenship.

The answer to the first questions of the *Hudzinski and Wawrzyniak* cases is set out above. While the *Bosmann* mechanism sufficed to satisfy Mr

103. Coucheir, et al., op. cit. *supra* note 99, 8; Van der Mei and Essers, op. cit. *supra* note 51, 965.

104. *Bosmann*, cited *supra* note 3, paras. 27, 28, 31–33, 36–37; *Hudzinski and Wawrzyniak*, cited *supra* note 1, paras. 45, 48–51, 55–57, 62, 68 and 70. See also C-62/11, *Land Hessen* v. *Feyerbacher*, judgment of 19 July 2012, nyr, paras. 45–46.

105. *Van der Duin*, cited *supra* note 49, paras. 41–42.

Hudzinski's claim, Mr Wawrzyniak saw his claims denied on the grounds of a German rule. Subparagraph (1) of paragraph 65 of the EStG, headed "Other child benefits", is a national anti-overlapping rule which reads "Child allowance shall not be paid for a child who is in receipt of . . . child benefits granted outside Germany and comparable to child allowance".[106] Mr Wawrzyniak's wife was in receipt of Polish child benefits. The third and fourth questions referred by the national court in the *Wawrzyniak* case concerned the compatibility of that provision with European Union law and the ensuing overlap of benefits. In essence, the question was whether a Member State is completely free to refuse benefits to persons insured in another Member State.

As in *von Chamier-Glisczinski* and *Commission* v. *Germany (long-term care benefits)*, one would have expected the ECJ to reject the claim, even if the social security legislation of the non-competent Member State in principle falls within the scope of the free movement provisions of the TFEU. Advocate General Mazák put forward several arguments in favour of an uncurbed *Bosmann* choice.[107] Not Germany, but Poland is the competent Member State under the conflict rules of the Regulation governing posting. There are neither indications nor allegations that those rules might breach EU law. The posting regime for workers serves the freedom to provide services and the free movement of workers, while avoiding administrative complications. *Bosmann* merely opened the option to grant child benefits, without imposing an obligation to do so. The Advocate General then invoked the sovereign power of Member States to organize their social security schemes. Finally, he defused the arguments, based on *Schwemmer,* put forward by the applicants in the main proceedings. The Advocate General accordingly concluded that the German anti-overlapping rule does not infringe European law, and can be enforced *in casu*. This conclusion was further supported by the Commission, the Hungarian Government, the German Government and the *Bundesfinanzhof*.

The ECJ underlined that, since a Member State other than the State competent under the Regulation has "the power, but not the obligation, to grant child benefits in accordance with its national law to a posted worker who works temporarily within its territory, that State must in principle also be able to decide, as the referring court stated, whether and, if appropriate, how it intends to take account of the fact that there exists in the State which is competent under that provision, in this case the Republic of Poland, entitlement to a comparable benefit".[108] It then strayed from the Advocate

106. *Hudzinski and Wawrzyniak*, cited *supra* note 1, para 12.

107. Opinion of A.G. Mazák in *Hudzinski and Wawrzyniak*, cited *supra* note 1, paras. 79–91.

108. *Hudzinski and Wawrzyniak*, cited *supra* note 1, para 70.

General's faithful account of *Bosmann* by testing the legality of the German provision cited above in the light of EU law. The anti-overlapping rules of secondary law, Article 10 Regulation 574/72 and Article 76 Regulation 1408/71, do not envisage a situation in which the Member State of employment coincides with the Member State of residence of the children. Considering paragraph 65 of the EStG in the light of the TFEU, the ECJ stated that its application entails a substantial disadvantage affecting mainly migrant workers to the extent that it prevents entitlement to benefits rather than reducing their amount by that of a comparable benefit payable by another State. The ECJ concluded that the German rule constitutes a breach of the free movement of workers, relying upon two considerations: Mr Wawrzyniak contributed to the funding of the child benefit through his income tax, which is the relevant connecting factor used in German legislation. The payment of the child benefit would not generate any disagreement with the freedom to provide services, since it would not entail any costs or administrative complications for Mr Wawrzyniak's employer.

It is submitted that the *Wawrzyniak* judgment opens a second gate to the social security system of the non-competent Member State, which transcends the particular circumstances of that case. It is operationalized through a test akin to that developed in *Baumbast*.[109] Under the long-standing conception of the hierarchy of norms in the internal market, national measures in the pre-emptive field of application of secondary legislation are subject to the principle of proportionality only when they derogate from harmonized norms or when taken in the exercise of discretionary powers.[110] There is a chain of tests of compliance. The compatibility of the rule of secondary legislation with the Treaty is tested in a highly abstract fashion: the judicial review of the exercise of the wide discretionary powers under the social security Regulations is confined to examining whether it is vitiated by manifest error or misuse of powers, or whether the institution concerned has manifestly exceeded the limits of its discretion.[111] Next, the compliance of national legislation with the valid rule of secondary legislation is scrutinized. If that hurdle is cleared, the provisions of national law are shielded from the *in concreto* proportionality assessment which they would otherwise have to undergo. Under that understanding of the conflict of norms, even if the non-competent Member State must apply its legislation, it is in no way prevented from relying on disentitling provisions in order to foreclose any

109. Case C-413/99, *Baumbast*, [2002] ECR I-7091.

110. Dougan, "The constitutional dimension to the case law on Union citizenship", (2006) EL Rev., 619.

111. *Vogler*, cited *supra* note 21, para 24.

claims under *Bosmann*: these provisions reflect the principle of exclusivity and other conflict rules of the Regulation, which themselves are valid.

In *Baumbast*,[112] the ECJ was asked whether an EU citizen who lost his right to reside as a migrant worker in the host Member State can, in his capacity as EU citizen, enjoy a right of residence there by direct application of Article 18(1) EC (now 21(1)TFEU), despite the fact that he did not fulfil the requirements of sickness insurance laid down in Directive 90/364. Article 21(1) TFEU grants every European citizen the directly effective right to move and reside freely within the territory of the Member States, "subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect". The ECJ considered the unsatisfied requirement of Directive 90/364 to be part of those limitations and conditions, which "must be applied in compliance with the limits imposed by Community law and in accordance with the general principles of that law, in particular the principle of proportionality".[113] The correct national application of valid norms of secondary law can thus be subjected to an *in concreto* proportionality assessment, albeit with a lighter intensity of review. In *De Cuyper*, *Hendrix* and *Petersen*, the ECJ applied this *Baumbast* test to the restrictions on the possibility to export unemployment benefits and SNCBs laid down in Regulation 1408/71.[114]

Straying from the path of the orthodox hierarchy of norms and treading in the footsteps of *Baumbast*, the ECJ subjected a disentitling provision of the non-competent State to a direct test under the free movement provisions of the TFEU in *Wawrzyniak*. This new form of indirect legal review allows a distinction to be drawn between Member States which are faced with a duty to grant benefits despite their own legislation and those which are still able to opt out of the system. The following is an attempt to assimilate the lessons of *Wawrzyniak* and other social security cases in order to outline the new test and identify some relevant variables. Three issues in particular should be settled: the standard of review, its intensity and its outcome.[115]

112. *Baumbast*, cited *supra* note 109.

113. Ibid., para 91.

114. Case C-406/04, *De Cuyper*, [2006] ECR I-6947; *Hendrix*, cited *supra* note 30; Case C-228/07, *Petersen*, [2008] ECR I-6989.

115. *Wawrzyniak* is not wholly unprecedented. In principle, a person shall enjoy the unemployment benefits of the Member State where he or she was last employed, that State being bound to acknowledge periods of insurance or employment completed elsewhere. Given that Mrs Chateignier never worked in Belgium, that State was not competent. Under certain conditions, Belgium however declared itself competent for Belgian nationals who last worked elsewhere and assimilated their periods of employment to Belgian periods of insurance against the risk of unemployment; since this benevolence covered foreigners only insofar as provided in an international convention, Mrs Chateignier, a French national, fell outside its scope. Such distinction constitutes a directly discriminatory restriction in breach of the right to equal

3.1. *The opt-out as a prima facie obstacle to the free movement of persons?*

Of course, the *Wawrzyniak* test applies only to domestic measures which amount to *prima facie* obstacles in need of justification. Which rules of the non-competent Member State must be qualified as such? A broad range of requirements hinder the access to benefits of a Member State lacking competence. Some rules are wholly unconnected to migration, and affect persons insured in a Member State, be it pursuant to the national conflict rules or pursuant to the Regulation, in the same fashion as persons in respect of whom that State is not competent. These "internal" rules neither constitute a *prima facie* restriction to free movement nor infringe any provision of the Regulations. The kinship and age conditions for child benefits are examples thereof.

The national anti-overlapping and exclusivity rules concern *only* those who have access to the social security scheme of another Member State. The German rule at issue in *Wawrzyniak* was considered an obstacle "in so far as it appears to require, . . . not a reduction in the amount of the benefit by the amount of that of a comparable benefit received in another State, but exclusion from that benefit".[116] This means that anti-overlapping rules which merely discount the national benefit by the amount of the foreign one do not raise an obstacle, and accordingly may be enforced.[117] "Disentitling" anti-overlapping rules and exclusivity rules, which produce the same effect, raise an obstacle to free movement which may however be justified.

In between those two extremes are rules which delineate the international field of application of a social security scheme while affecting both insured and uninsured persons. For instance, often benefits are granted only to persons who reside or work *in* the country at a certain point in time or did so for a certain period. The same is true for conditions regarding the payment of social

treatment on grounds of nationality of work-seekers under Art. 3(1) Regulation 1408/71 and Art. 39(2) EC (Art. 45(2) TFEU) (Case C-346/05, *Chateignier*, [2006] ECR I-10951). Ms Kaske found herself in a rather similar position; the main difference for our purposes lies in the fact that the Austrian legislation benefited persons who last worked in another State on condition that they had resided or habitually stayed in Austria for a total of at least 15 years before their last employment abroad. The condition was found to be indirectly discriminatory under Art. 48 EEC Treaty (now 45 TFEU) (Case C-277/99, *Kaske*, [2002] ECR I-1261). Both cases are ill-suited for extrapolation since the ECJ was entirely oblivious to the issue of competence.

116. *Hudzinski and Wawrzyniak*, cited *supra* note 1, para 76.

117. Such rules result in the grant of a supplement when the benefits of the non-competent Member State exceed those of the competent Member State. They may interest those Member States wishing to participate in the new system to a certain extent only, but fall short of constituting an opt-out.

security contributions. Whether they are caught by the prohibition against obstacles, has yet to be clarified.[118]

The importance of such "external" provisions should not be underestimated. If all limits to the international field of application of the social security schemes of non-competent Member States were waived in the name of the free movement of persons, parents raising children under 18 would be able to simultaneously claim (tax-financed) family benefits in most, if not all, Member States.

Mr Wawrzyniak incurred a disadvantage corresponding to the discrepancy in amount between the Polish child benefit, around €12 per month, and the German benefit amounting to €154 monthly. The question whether Mr Wawrzyniak truly encountered a restriction to his free movement rights merits closer scrutiny and further study, since migrating did not influence his or his family members' legal position at all.[119]

In any case, the ECJ deviates from its habit of narrowing the interests of the workers in the determination of the applicable legislation to the avoidance of positive and negative conflicts of laws and administrative complications:[120] the actual content of the applicable legislation, i.e. the social security rights

118. The ECJ considered a past residence condition as incompatible with the free movement rights of workers in *Kaske* (cited *supra* note 115).

119. It could be argued that the disadvantage was not discriminatory in nature. The principle of non-discrimination on grounds of nationality only prohibits distinctions between persons in comparable situations. In the field of social security law, the comparability test adopts a particular form: the comparator of a migrant person is a sedentary person who is *insured in the same Member State* and possesses the same relevant features (Pennings, "Co-ordination of social security on the basis of the State-of-employment principle: Time for an alternative?", (2005) CML Rev., 80–82; Opinion of A.G. Mazák in *Bosmann*, cited *supra* note 3, paras. 77–81; Opinion of A.G. Sharpston in Case C-212/06, *Government of the French Community and Walloon Government* v. *Flemish Government (*hereinafter *"Flemish care insurance")*, [2008] ECR I-1683, paras. 76–79). Hence Mr Wawrzyniak must be compared to all workers employed and insured in Poland. Since a person is not comparable to persons insured in another Member State, by definition the principle of non-discrimination laid down in the Regulation cannot be relied upon to gain access to the social security schemes of a Member State which is not competent. Art. 45(2) TFEU also grants Mr Wawrzyniak only a right to non-discrimination with reference to workers employed in Poland, not Germany. In *Finalarte*, the ECJ held that, since they do not seek access to the labour market of the host State and they return to their country of origin or residence after completion of their work, posted workers cannot invoke Art. 48 EEC (now 45 TFEU) against the first State (Joined Cases C-49, 50, 52–54 & 68–71/98, *Finalarte*, [2001] ECR I-7831, paras. 21–23. See Verschueren, "Cross-border workers in the European internal market: Trojan horses for Member States' labour and social security law?", (2008) *International journal of comparative labour law and industrial relations*, 173–177). By acceding to the claims of Mr Wawrzyniak to equal treatment in the host State where the posting employer does not incur any disadvantage (paras. 82–84), the ECJ might signal a shift towards a more worker-oriented approach, at least where the freedom to provide services of the employer is not at stake (see also Joined Cases C-307-309/09, *Vicoplus*, [2011] ECR I-453).

120. Jorens, op. cit. *supra* note 93, 180–181.

and obligations, enters the field of vision of the judicial review of the enforceability of (at least some) conflict rules.

3.2. *The intensity of review and grounds of justification*

Any rule hindering free movement may be justified on public interest grounds. The traditional justification and proportionality test cannot be applied as such to a national rule which reflects both the letter (Art. 13(1) Regulation 1408/71 and *Ten Holder*) and, arguably, the spirit of European social security coordination (the inherent argument). It seems that the new test developed in *Baumbast*, *De Cuyper*, *Hendrix*, *Petersen* and *Wawrzyniak* is a variation thereupon, distinguished by compelling justification grounds and a lighter intensity of review.

In *Wawrzyniak*, the ECJ began its answer to the questions pertaining to enforceability of the German anti-overlapping rule by recalling that the non-competent Member State has the power, but not the obligation to grant benefits to uninsured persons and can thus in principle freely choose how to take into account entitlement to comparable benefits accruing in the competent Member State. The more interference of European law in the legislation of the non-competent Member State, the less meaningful its freedom to refuse to partake in the new system of social protection. The endangered provisions are those that define the international field of application of social security schemes, which constitute the only tailored means to opt out; alternatives necessarily affect persons insured in that Member State and would therefore lower their levels of protection. The powers of the non-competent Member States in matters of social security are thus curtailed by the judge-made obligations imposed on them.[121] Every European duty, as a corollary, deprives the principle of exclusivity, as laid down in Article 13(1) and the case law of the ECJ, of a part of its *effet utile*. That principle, the value of which the ECJ consistently emphasizes,[122] should deploy its full effects in the absence of purely national rights worthy of protection and exceptions expressly provided for in the Regulations. The conflict rules at stake also pass the test of compliance with the Treaty.[123] The posting rule for employed persons is lauded by the ECJ as an instrument to

121. See also *von Chamier-Glisczinski*, cited *supra* note 25, para 63 and Opinion of A.G. Mazák in *Hudzinski and Wawrzyniak*, cited *supra* note 1, para 85.

122. See e.g. the case law cited in notes 7, 169 and 179. In its *Wawrzyniak* judgment, the ECJ alluded to the lawfulness of the exclusivity principle, even when the applicable legislation provides benefits inferior to the benefits of the same kind of another Member State (*Hudzinski and Wawrzyniak*, cited *supra* note 1, paras. 41–44).

123. Opinion of A.G. Mazák in *Hudzinski and Wawrzyniak*, cited *supra* note 1, paras. 81–83.

promote the freedom to provide services and the free movement of workers, encouraging economic interpenetration and preventing administrative complications for workers, undertakings and social security organizations alike.[124] Ruling on the application of the free movement provisions of the Treaty to national provisions which mirror valid rules of Regulation 1408/71, the ECJ has substantially lowered the intensity of review in order to pay due regard to the autonomy of the European legislature;[125] the provisions of the Regulation created "at least a strong presumption in favour of upholding the national territorial restrictions".[126] In *Hudzinski and Wawrzyniak*, the ECJ underscores that the grant of the benefit to the claimants would not be "liable to affect disproportionately the predictability and effectiveness of the application of the coordination rules of Regulation No 1408/71".[127]

European obligations stemming from the Regulation and/or the TFEU generate frictions with the neutral character of EU social security coordination,[128] which are neither redeemed by the *Petroni* principle nor by the principle of non-discrimination. In both *von Chamier-Glisczinski* and *Commission* v. *Germany (long-term care benefits)*, the ECJ's refusal to impose duties on the non-competent Member State exceeding those derived from *Bosmann* was largely based on that consideration. The *Petroni* principle supports an unrestricted right to opt out of the new regime and opposes any intervention of European law in the social security affairs of the non-competent Member State. It shields the purely national rights of the *competent* Member State from any interference by European law:

"[s]o long as a worker is receiving a pension by virtue of national legislation alone, the provisions of Regulation No 1408/71 do not prevent the national legislation, *including the national rules against the overlapping of benefits*, from being applied to him in its entirety, provided that if the application of

124. Case 35/70, *Manpower*, [1970] ECR 1251, para 10; *Fitzwilliam*, cited *supra* note 7, para 28; *Plum*, cited *supra* note 7, para 19. See also *Hudzinski and Wawrzyniak*, cited *supra* note 1, para 82.

125. *De Cuyper*, cited *supra* note 114; *Hendrix*, cited *supra* note 30, para 55; *von Chamier-Glisczinski*, cited *supra* note 25, in particular paras. 64–65, 86–87; *Commission* v. *Germany (long-term care benefits)*, cited *supra* note 25, in particular para 54.

126. Dougan, "Expanding the frontiers of Union citizenship by dismantling the territorial boundaries of the national welfare states?" in Barnard and Odudu (Eds.), *The Outer Limits of European Union Law* (Hart Publishing, 2009), p. 144.

127. *Hudzinski and Wawrzyniak*, cited *supra* note 1, para 67.

128. The ECJ explained that the disadvantage caused by the German anti-overlapping rule constitutes an obstacle contravening the free movement of workers "even if it can be explained by the disparities in the social security legislation of the Member States which subsist despite the existence of the coordinating rules laid down by EU law" (*Hudzinski and Wawrzyniak*, cited *supra* note 1, para 81; see also paras. 42–43).

such national legislation proves less favourable than the application of the rules [of the Regulation] those rules must . . . be applied."[129] (our emphasis)

Should the non-competent State be subject to obligations from which the competent Member State is exempted?[130] As to the principle of non-discrimination on grounds of nationality, it was argued above that, at least *in casu*, that principle cannot be invoked against the non-competent Member State.[131] This should have a tangible effect on the intensity of review of the proportionality assessment: direct discrimination is scrutinized with the greatest care and severity,[132] while the ECJ is more restrained in its assessment of the proportionality of genuinely non-discriminatory obstacles.[133]

The so-called "real link" became the most meaningful justification ground during the past decade. It rests on the idea that Member States can legitimately exclude persons from their welfare system whose link with their labour market, social security system or society is too tenuous. Conversely, persons having such a link should in principle gain access to their social security scheme. Conceived in the citizenship case law concerning welfare benefits falling outside the scope of the Regulation,[134] the "real link" justification grew to cover situations governed by the Regulation as a corollary of the increased permeability of the Regulation to the direct application of the TFEU.[135] First, the Member State must show that the contested benefit is an expression of solidarity which consequently can be restricted to a solidaristic community.[136] Once that hurdle is cleared, the claimant must establish that he or she is a member of that community. Of course, some benefits are solely an expression of solidarity, such as pure social assistance, while others are only linked to economic activity, such as occupational pensions. Social security benefits are to be located somewhere in between those two extremes, depending on a set of variables including their "social purpose, applicable qualifying criteria,

129. Case 22/77, *Mura I*, [1977] ECR 1699, operative part; Case 37/77, *Greco*, [1977] ECR 1711, operative part; Case 98/77, *Schaap I*, [1978] ECR 707, para 10. See also Case 26/78, *Viola*, [1978] ECR 1771; Case C-5/91, *Di Prinzio*, [1992] ECR I-897, paras. 16–18 and the case law cited. This is now codified in Art. 52 Regulation 883/2004.

130. This argument loses some strength with respect to family benefits, since the line of case law started in *Laterza* lifts the boundary of the purely national rights (*Laterza*, cited *supra* note 36).

131. See note 119 *supra*.

132. E.g. *Chateignier*, cited *supra* note 115.

133. Spaventa, *Free Movement of Persons in the European Union: Barriers to Movement in their Constitutional Context* (Kluwer Law International, 2007), pp. 85–86, 99.

134. E.g. Case C-224/98, *D'Hoop*, [2002] ECR I-6191.

135. E.g. Case C-138/02, *Collins*, [2004] ECR I-2703; *Hendrix*, cited *supra* note 30; Case C-503/09, *Stewart*, judgment of 12 July 2011, nyr.

136. Dougan, op. cit. *supra* note 126, pp. 150–157. See e.g. *Hendrix*, cited *supra* note 30, para 55. The ECJ somewhat cryptically alluded to the nature of the benefit in *Hudzinski and Wawrzyniak*, cited *supra* note 1, para 65.

chosen method of funding, and indeed [their] perception within the relevant society".[137] For our purposes, this means that the stronger the solidarity component of a benefit, the stronger the case for finding proportionality in the refusal to grant a benefit by the non-competent Member State. The contested child benefits seem to hold the middle ground of the spectrum. Given the horizontal reach of the *Bosmann* regime and in the absence of any indications to the contrary, it must be assumed that *Wawrzyniak* equally covers all social security benefits.[138] The strength of the non-competent State's claim to opt-out of the new regime should fluctuate somewhat according to the nature of the benefit.

The rules of the non-competent Member State delineating its international field of application are undoubtedly justified. Most arguments are institutional and apply with equal force regardless of the facts of the case. They can be condensed into two ideas: the lawful and applicable Article 13(1) Regulation 1408/71 must be treated with due deference and the lack of access to the benefits of the non-competent Member States is *inherent* in a system of coordination which does not have the ambition to harmonize social security laws. The strength of other grounds of justification may depend on the facts of the case. Taken together, all arguments lead to a strong, but rebuttable presumption that the non-competent State's opt-out is proportionate.

3.3. *The proportionality review*

Other arguments tilt the balance in the other direction, bolstering the case for the grant of benefits. *Wawrzyniak* creates a new space for the acknowledgment of the personal circumstances of the worker and his or her employer. Admittedly, in that case the proportionality test was not clearly articulated and only a limited number of circumstances were taken into account; however, the capacity of the ECJ to discount an argumentation based on other circumstances, subsumed in an *in concreto* application of the principle of proportionality, may be seriously doubted.[139] Since the benefits at stake in *Wawrzyniak* can be restricted to a solidaristic community, the burden of proof shifts to the individual who must demonstrate his or her membership of that community. In *Hendrix*, the ECJ attached a decisive significance to the circumstance that the claimant had kept all of his economic and social links to his Member State of origin. In *Wawrzyniak*, the ECJ dealt with the question of

137. Dougan, op. cit. *supra* note 126, pp. 155–156.

138. In *Kaske* and *Chateignier*, both cited *supra* note 115, the ECJ used an analogous approach in the field of unemployment benefits.

139. The ECJ imposed the requirement of proportionality to a State lacking competence in *Chateignier*, cited *supra* note 115, para 32.

the real link in a somewhat subdued way. The fact that Mr Wawrzyniak seemingly contributed to the funding of the benefit through income tax made the incurred disadvantage appear "even less justifiable".[140] The importance of this proprietary dimension is exemplified by the ECJ's increasing hostility to the payment of social security contributions on which there is no return.[141] The ECJ might have considered the contribution to the funding as indicatory of a real link, as it did in *Commission* v. *the Netherlands* and *Caves Krier Frères*.[142] Besides, it is settled case law – but was not repeated in the *Wawrzyniak* case – that an economic contribution[143] to the host State constitutes a link sufficiently close to allow for the exportability of the benefit.[144] The existence of a sufficiently close link remains controversial, for the ECJ seems to require a certain permanency of the link, which Mr Wawrzyniak probably fell short of achieving even though he only claimed benefits for the period of posting (February to December 2006); an economic contribution as a posted person does not equal that of a person who is fully integrated in the labour market of the host Member State; and his connection to Germany was in any case outshone by the solid links he had with Poland. While it is true that the ECJ did not directly engage with the issue of the real link in *Wawrzyniak*, it would struggle to resist an argumentation based on that notion: the real link increasingly permeates through the Regulations.[145]

The oft-repeated objective of the principle of exclusivity is to avoid the administrative difficulties flowing from the duplication of legislations.[146] The *Nonnenmacher* case law necessitated the particularly difficult determination of the so-called additional advantage. Granting a supplementary benefit to Mr Wawrzyniak did not entail major administrative problems.[147] After reiterating that the rationale of the posting rules lies in the freedom to provide services,

140. *Hudzinski and Wawrzyniak*, cited *supra* note 1, para 78. The ECJ also hinted at the real link when it described the subjection to tax liability as a "sufficiently close" connection between the situations at issue and the German territory with regard to benefits financed through tax revenue (*Hudzinski and Wawrzyniak*, cited *supra* note 1, para 66).

141. E.g. *Leyman* and *da Silva Martins*, both cited *supra* note 25.

142. Case C-542/09, *Commission* v. *Netherlands*, judgment of 14 June 2012, nyr, para 66; Case C-379/11, *Caves Krier Frères*, judgment of 13 Dec. 2012, nyr, para 53; Devetzi, op. cit. *supra* note 88, 451. See also, more generally, Dougan, op. cit. *supra* note 126, pp. 152–153 and Opinion of A.G. Kokott in *Hendrix*, cited *supra* note 30, para 66.

143. On marginal employment, see Case C-213/05, *Geven*, [2007] ECR I-6347.

144. Case C-57/96, *Meints*, [1997] ECR 6689; Case C-35/97, *Commission* v. *France (supplementary retirement pension points)*, [1998] ECR I-5325; Case C-212/05, *Hartmann*, [2007] ECR I-6303; *Commission* v. *Netherlands* and *Caves Krier Frères*, both cited *supra* note 142.

145. See the cases referred to in note 135 *supra*.

146. See *supra* note 14.

147. That seemed also to be the case with regard to Mrs Bosmann and Mr Hudzinski. See, with regard to the *Bosmann* case, Van der Mei and Essers, op. cit. *supra* note 51, 965.

the ECJ insisted that the German refusal was not aimed at preventing costs and administrative complications for undertakings employing posted workers in Germany, since no such drawbacks arose in the present case.[148]

Whether the ECJ struck the right balance between individual rights and collective responsibilities is open for discussion. The contrast between the *von Chamier-Glisczinski* and *Wawrzyniak* cases is instructive.[149] Against the sheer number of arguments supporting an application of the anti-overlapping rule, one can oppose Mr Wawrzyniak's capacity of economically active person, his contribution to the funding of the benefit through income tax liability and the lack of administrative complications. The outcome is strongly supported by the general principle of equality, which the ECJ however failed to investigate.[150] The problem rather stems from the fact that it is most unclear what weight must be ascribed to each factor. For instance, if the lack of administrative difficulties is sufficient when taken in isolation to overrule an opt-out, the balance would be skewed.

In *von Chamier-Glisczinski*, the ECJ refrained from applying the *Baumbast* test. It examined the conformity of the disadvantage suffered by Mrs von Chamier-Glisczinski by reason of her move to a care home in Austria with the free movement rights conferred on her by Article 18(1) EC. However, it did not perform a proportionality assessment. The ECJ instead based its conclusion on the powers of the Member States, the validity of the applicable provisions of secondary law and the neutral character of EU social security law. What if the *Baumbast* test had been applied? Beneath the apparent

148. *Hudzinski and Wawrzyniak*, cited *supra* note 1, paras. 82–84.

149. A comparison with *Commission* v. *Germany (long-term care benefits)*, cited *supra* note 25 is more difficult, given the nature of infringement proceedings, while the ECJ's neglect of the competence question in *Kaske* and *Chateignier* makes them less suitable for such exercise.

150. In the context of family benefits, the principle of exclusivity does not deploy its full effects. Arts. 76–79 Regulation 1408/71 and Art. 10 Regulation 574/72 govern primarily the concurrence of entitlements to family benefits in the Member State of employment of the parents and the Member State of residence, and organize plurality of applicable legislation. They vest one State with primary competence; if the other State grants benefits at a higher level, it is bound to supplement the lower benefits up to the level of its own benefits. The guarantee of the highest benefits is limited to the situations envisaged by the above provisions. In *Dammer*, the ECJ expressed its dissatisfaction with this boundary by granting a supplement to persons who could not invoke the protection of these provisions (Case C-168/88, *Dammer*, [1989] ECR 4553). *Bosmann* and *Hudzinski* extend it to situations where a purely national right exists in a non-competent Member State. The *Wawrzyniak* case could be read in the same light: equality as a general principle of law opposes a distinction between persons having links with more than one Member State based on whether their situation fits within the framework of the relevant provisions of the Regulation, even if that distinction ultimately rests on the very nature of the *Petroni* principle. While it is regrettable that this argument is absent from the ECJ's reasoning, the *Bosmann* and *Hudzinski and Wawrzyniak* cases contribute to filling a lacuna by generalizing the supplement.

differences with the circumstances in *Wawrzyniak*, a certain resemblance is hidden: Mr and Mrs von Chamier-Glisczinski did contribute to the financing of the contested care benefit through their sickness benefit contributions; they maintained a link with the German social security scheme;[151] and the reimbursement of their care costs would not have entailed insurmountable administrative difficulties or additional contributions. Moreover, the argument derived from the separation of powers lacks cogency since the inclusion of long-term care benefits in the chapter on sickness benefits was the work of the ECJ, not of the European legislature.[152] Finally, as Advocate General Mengozzi demonstrated, the *Kohll* and *Vanbraekel* line of case law also furthers her case.[153] That is not to say that the ECJ should necessarily have reached a different conclusion in either case,[154] but the fact that the difference in outcome remains unexplained adds to the confusion.

In general, both cases would have benefited from a more elaborate reasoning. Amongst other things, the ECJ should either root *Wawrzyniak* more explicitly in the *Baumbast* jurisprudence and make the proportionality principle more prominent, or explain what distinguishes the two cases. In both *Wawrzyniak* and *von Chamier-Glisczinski*, the real link merits a clearer articulation. The ECJ in *Wawrzyniak* attached significance to a select number of personal circumstances of the claimant and his employer. While it did not as such require an *in concreto* proportionality assessment on the basis of all potentially relevant characteristics of the benefit, the claimant and, where relevant, his employer, the ECJ ventures on a slippery slope: if no personalized proportionality test is to be carried out, it is incumbent upon it to explain why.[155] The arguments in favour of a choice of the non-competent Member State might usefully be invoked for that purpose.

151. On the relevance thereof, see *Stewart*, cited *supra* note 135, paras. 97–100.

152. *Molenaar*, cited *supra* note 62.

153. Opinion of A.G. Mengozzi in *von Chamier-Glisczinski*, cited *supra* note 25; *Kohll*, cited *supra* note 57; *Vanbraekel*, cited *supra* note 49. See also *Commission* v. *Germany (long-term care benefits)*, cited *supra* note 25; and see note 49 *supra*.

154. E.g. the difference between economic and non-economic freedoms could underlie this discrepancy: neither the Regulation nor Art. 18(1) EC allowed Mrs von Chamier-Glisczinski to claim a right to non-discrimination in comparison to persons insured in Germany and staying in a care home there. Also, one cannot exclude that *von Chamier-Glisczinski* would have been decided differently *anno* 2013, although *Commission* v. *Germany (long-term care benefits)*, cited *supra* note 25, suggests the opposite.

155. Contrast *Bidar* and *Förster* (Case C-209/03, *Bidar*, [2005] ECR I-2119; Case C-158/07, *Förster*, [2008] ECR I-8507).

3.4. *Secondary legislation*

Another outstanding issue is which rules set a standard binding the non-competent Member State. It is clear that the other free movement rights of the TFEU can trigger the *Wawrzyniak* rule. The effect of certain pieces of secondary legislation has yet to be settled.

There is no doubt that Regulations 883/2004 and 987/2009 are implicitly, if not explicitly, directed at the competent Member State only. Will the ECJ accept that they do not impose any obligations on non-competent Member States?[156]

The provisions of Directive 2004/38 apply to the Member State of residence, regardless of its competence under Regulation 883/2004. Subject to certain conditions and limitations, Article 24 Directive 2004/38 grants all Union citizens residing in the host Member State a right to be treated equally to the nationals of that State. Could that rule be relied upon to waive an opt-out of a State in which a person resides but which lacks competence?[157] The answer to this question depends on the relationship between the Directive and the social security Regulations.[158] More specifically, how does Article 24 Directive 2004/38 (jeopardizing opt-outs) correlate to the principle of exclusivity laid down in Article 11(1) Regulation 883/2004 (protecting opt-outs)? A compromise would be to require non-competent Member States to justify a derogation from Article 24, while conceding them a presumption of proportionality in order to give effect to Article 11.

4. Contribution duties and other disadvantages

Acceding to the social security system of a Member State lacking competence can entail disadvantages. There is an undeniable need to devise a method to deal with these burdens, and in particular the issue of contribution duties. Burdens might result in *net* losses for the migrant. This would defeat the free movement rationale underlying the *Bosmann* and *Hudzinski and Wawrzyniak* cases. The German child benefit at issue in those cases was financed solely by tax income. While tax revenue is increasingly used to finance social security expenses, most benefits are, at least partly, financed through social security contributions. Tax and social security contributions are treated in a

156. In *Hendrix*, *von Chamier-Glisczinski* and *Hudzinski and Wawrzyniak*, the Court examined the opt-out in the light of the Regulations. It is unclear whether the Court thereby merely sought to establish that the defendant institution belonged to a Member State lacking competence, or instead used the Regulations as a yardstick for the opt-out measures.

157. See Coucheir et al., op. cit. *supra* note 99, 9 and 26–29.

158. The Court might shed some light on this issue in Case C-140/12, *Brey*, pending.

fundamentally different way in European internal market law, which probably will reverberate on the reach of the new regime of social protection. Competence under the Regulations is no longer an absolute requirement for entitlement; is it always a precondition for the collection of contributions? The issue is as delicate as it is important: at stake are the free movement rights of the insured person, those of his employer and the institution's interest in securing durable funding of its expenses. Neither in *Bosmann* nor in *Hudzinski and Wawrzyniak* did the ECJ take a stance on this, since no disadvantage arose. In the latter case, the ECJ recalled that the provision on the posting of workers is aimed to facilitate the freedom to provide services of the posting undertaking. It explained that this objective would not be frustrated by granting the benefit to Mr Wawrzyniak, since that undertaking is neither liable to contribute to the funding of the benefit nor subjected to any additional administrative formalities.[159] In this matter one should distinguish between the *Bosmann* and *Wawrzyniak* routes to the social security systems of non-competent States.

Contributions duties are mostly incompatible with the purely national rights which *Bosmann* protects: since persons (and employers) do not pay any contributions to the social security schemes of a State lacking competence, they fail to meet the conditions of national law. This may be different when the State in question is competent in general to levy contributions for the relevant branch of social security, but not to award the claimed benefit. This is illustrated by the care benefits in kind at stake in *von Chamier-Glisczinski* and *Commission* v. *Germany (long-term care benefits)*. Another scenario concerns the situation of a Member State that lost competence relatively recently, where a person might have paid sufficient contributions before being subjected to the legislation of another State. Sometimes foreign contributions are credited to a person by virtue of national law only.[160] Most often, *Bosmann* will thus concern non-contributory benefits. *Bosmann* does not overrule *Ten Holder* inasmuch as the non-competent Member State is still prevented from levying contributions.[161]

The relationship between the *Wawrzyniak* mechanism and disadvantages is particularly opaque. The most plausible options would be either to restrict that mechanism to non-contributory benefits, or to fit the disadvantages within the framework of the test outlined above. Pre-*Bosmann*, the prohibitive effect of the European conflict rules covered the benefit-side of social security (*Ten*

159. *Hudzinski and Wawrzyniak*, cited *supra* note 1, paras. 82–84.

160. E.g. *Kaske* and *Chateignier*, both cited *supra* note 115.

161. Van der Mei and Essers, op. cit. *supra* note 51, 965; Van der Mei, "Overview of recent cases before the European Court of Human Rights and the European Court of Justice (April – June 2012)", (2012) EJSS, 203.

Holder) and its contribution-side (*Perenboom*). *Wawrzyniak* lifts the exclusive effect with respect to the former side only. The ECJ's first option would be to maintain that effect with respect to contribution duties. Just as with the *Bosmann* system, the non-competent Member State would be stripped of the power to collect contributions in the absence of an express mandate of the Regulations. Apart from the situation of the formerly competent State, the partially competent State and the aggregating State outlined above, the *Wawrzyniak* system would be confined to non-contributory benefits. This option would find support amongst scholars[162] and in the ECJ's case law;[163] in a judgment following the *Hudzinski and Wawrzyniak* cases, the ECJ held that liability to pay double social security contributions would be "manifestly contrary to the objectives of Regulation No 1408/71".[164]

Alternatively, the ECJ could frame the issue of the disadvantages within the proportionality test, which by its very nature applies only when not gaining access to the social security system of the non-competent Member State places the individual at a *net* disadvantage. Two clusters of redoubtable difficulties would come into being. In the first place, the determination of the "net advantage" is bound to be fraught with problems.[165] Even if there is such an advantage, can a person invoke the proportionality principle (i) to acquire a right to contribute, perhaps retroactively, to the scheme of a State lacking competence, (ii) to coerce his or her employer into contributing to such a

162. Van der Mei, ibid., 203.

163. *Commission* v. *France (CRDS)*, paras. 45–48 and *Commission* v. *France (CSG)*, paras. 42–45, both cited *supra* note 11; see also *Hudzinski and Wawrzyniak*, cited *supra* note 1, paras. 82–84.

164. *Partena*, cited *supra* note 2, para 54. The statement is not conclusive, since the context is completely different and the ECJ reasoned on a high level of abstraction which did not allow the impact of the possible existence of an additional advantage to be taken into account.

165. Under a cost-benefit approach, the calculation of the net advantage depends on the uncertain materialization of the risk, the (changing) circumstances of the person and the (changing) laws of the Member States concerned (on the *Nonnenmacher* rule, see Voirin, "Salariés travaillant sur le territoire d'un État membre autre que celui où il réside: Accident du trajet: cumul ou non cumul: Annotation to Case 19/67, van der Vecht", (1968) *Droit social*, 487 and Van der Mei and Essers, op. cit. *supra* note 51, 960–961). Alternatively, inspiration could be drawn from A.G. Sharpston, who opined that affiliation to the Flemish care insurance is a net advantage, since it must be assumed that the Flemish Government intended it as a benefit rather than a burden and since, while some will not benefit directly, everyone benefits potentially (Opinion in *Flemish care insurance*, cited *supra* note 119, paras. 68–70). While it would be operational, this presumption would unduly downplay the importance of disadvantages in the *Wawrzyniak* system. Finally, leaving the person concerned to decide whether the advantage outweighs the disadvantages would sit uneasily with the nature of European and national social security law (e.g. Case 12/67, *Guissart*, [1967] ECR (English spec.ed.) 433; Case 58/87, *Rebmann*, [1988] ECR 3467, para 9; *Aldewereld*, cited *supra* note 11, paras. 15–20; *van Delft*, cited *supra* note 25, in particular paras. 52–54; Jorens, op. cit. *supra* note 93, 181–183).

scheme, or even (iii) to contest the very enforceability of a contribution duty, where such contributions have been paid in the competent State?

Bosmann is by its very nature contained by contribution duties. As to *Wawrzyniak*, whichever option the ECJ favours, the presence of contribution duties will have the effect of substantially limiting the scope of the new regime of social protection, since most benefits are, at least partly, financed through social security contributions.[166] The ECJ seems well aware thereof.[167] The Beveridgean and Scandinavian countries rely relatively heavily on tax revenue and will be most affected by *Bosmann* and *Wawrzyniak*.

5. Conclusion

Since the origin of EU social security law, the ECJ has used the Treaties to impose obligations on the competent Member States in order to facilitate the free movement of persons. In the last fifteen years, it has experimented with novel models of hierarchy of norms for that sake. Most notable are the impact of the free movement of services upon the coordination of sickness benefits and that of EU citizenship on the fields of unemployment benefits and SNCBs. The ECJ now takes a further step by revising the privileged status of the Member States lacking competence.

Nonnenmacher was the first stage in the ECJ's continuous search for a balance between the exclusivity principle and the establishment of the greatest possible freedom of movement for migrant citizens. The latter interest, which is an objective of Article 48 TFEU, is often, but not always, served by an uncompromising exclusivity of the applicable legislation. *Ten Holder* established a strict exclusivity principle, according to which other objectives of EU social security law, such as legal certainty, the interests of employers (freedom to provide services) and institutions and respect for the prerogatives of the European legislature, are slightly prioritized over the free movement objective. The balance is now tilted to the other side. In a mere few years, the legal status of the non-competent State underwent radical change: for decades, a Member State was prevented from granting social security benefits to citizens for whom it was not competent; recently, it was allowed to do so, but not compelled; nowadays, that State may, under certain circumstances, even be obliged to award benefits. The citizens have an increasingly strong claim to protection under the social security systems of countries with which they have

166. SNCBs and most family benefits are tax-financed. See also the three exceptions mentioned in the paragraph accompanying notes 160 and 161.

167. E.g. *Hudzinski and Wawrzyniak*, cited *supra* note 1, paras. 82–84.

a connection, even when that connection is not formalized as "competence" within the meaning of the Regulation.

What, then, is the current legal value of the principle of exclusivity? That principle and the new system of social protection relate as communicating vessels. Unless *Bosmann* or *Wawrzyniak* is applicable or a special provision of the Regulation expressly spreads the competence among more than one State, the legislation of one and only one Member State must be applied, even when "those benefits are less favourable than the benefits of the same kind provided for by [the legislation of the non-competent Member State]".[168] That is the signal that the ECJ sent by reaffirming the lasting value of the exclusivity principle in the cases where it was heavily contested[169] and subsequent judgments.[170]

Relying upon the free movement provisions of the TFEU, the ECJ affords an additional layer of social security protection to migrant citizens. National law, the Regulation and the TFEU increasingly operate as complementary sources of entitlements: each legal sphere sets a floor of rights upon which the others may improve for the sake of the migrant's interests. While this development so far targeted the competent Member State, the ECJ devised a new mechanism to allocate social security responsibility to some non-competent Member States, while sparing others. This effectively amounts to a new system of social security protection for migrants which rests on two pillars, both of which reshape the constitutional relationship between the free movement provisions of the TFEU on the one hand, and, on the other, secondary Union legislation and national law.

First, entitlement can arise out of the unilateral will of each State. The ECJ reinforces and extends the principle of inviolability of purely national rights; to that extent, its rulings constitute a change in the understanding of the doctrine of pre-emption in matters of European social security law. This has the welcome effect of allowing all Member States, whether competent or not, to take measures to protect migrants from the shortcomings of the Regulations on a voluntary basis. The ECJ effectively organizes a transfer of power from the European legislature, which is deprived of the possibility to enact an absolute principle of exclusivity, to the Member States, who can, at their own discretion, maintain exclusivity or tolerate a certain plurality. In doing so, the ECJ kept the best interests of migrant European citizens at heart, without compromising legal certainty or the powers of the Member States. *Bosmann* is

168. *Hudzinski and Wawrzyniak*, cited *supra* note 1, para 44.

169. *Hudzinski and Wawrzyniak*, ibid., paras. 41, 44, 67, 82–84; *Bosmann*, cited *supra* note 3, paras. 16, 17; *Commission* v. *Germany (long-term care benefits)*, and *von Chamier-Glisczinski*, both cited *supra* note 25.

170. *Partena*, cited *supra* note 2, paras. 45, 47 & 54; *Format*, cited *supra* note 7, para 29; *Dumont de Chassart*, cited *supra* note 25, para 38.

moreover consonant with the notion of the real link: it is hard to argue that a person meeting all conditions for the payment of benefits under the legislation of a Member State would not have a sufficiently close link to that State.

In *Bosmann*, the ECJ unlocked the gate to the social security system of States lacking competence, leaving the keys in the hands of those States. *Wawrzyniak* shows that the ECJ keeps a master key, the proportionality principle, in order to help some migrants: the TFEU can impose a duty to partake in the new regime against the will of Member States, which hit a boundary in *von Chamier-Glisczinski* and *Commission* v. *Germany (long-term care benefits)*. *Wawrzyniak* is not so much a deepening or denaturation of *Bosmann* as a complement thereto. The constitutional significance of *Wawrzyniak* relates to the indirect legal review of the proportionality of provisions of secondary European law introduced in *Baumbast*. That test, which in the field of social security had previously been applied only to the question of portability of benefits,[171] now also governs the exclusivity principle. One may expect it to spread further in the context of the social security regulations and beyond: potentially, it could apply to every situation in which the TFEU would be more mobility-friendly than secondary legislation.[172] In *Wawrzyniak*, just as in *Hendrix* and *Petersen*, the ECJ let its citizenship case law inform, and indeed alter, its reading of the free movement of workers.

The test starts from the premiss that the new regime is in principle optional for Member States. Institutional reasons ground a presumption of proportionality, which may however be rebutted by elements pertaining to the situation of the individual. The relative similarity between the relevant circumstances of Mr Wawrzyniak and Mrs von Chamier-Glisczinski makes it clear that the ECJ has a long way to go in shedding light on the respective weight of these individual circumstances, let alone separating the sufficient and necessary elements from the irrelevant ones in collaboration with the national courts.

Extending the reach of the indirect judicial review conceived in *Baumbast* entails both opportunities and risks. It could be used to refine the sometimes blunt regulatory framework of the Regulations by conditioning the application of some of its provisions to the safeguard of proportionality. The main added value of a personalized proportionality test thus lies in its coutribution to fairness.[173] However, by making the application of national rules without

171. *De Cuyper*, cited *supra* note 114; *Hendrix*, cited *supra* note 30; *Petersen*, cited *supra* note 114.

172. See also Dougan, op. cit. *supra* note 110, 615, 633–639.

173. See also Dougan and Spaventa, "Educating Rudy and the (non-)english patient: A double-bill on residency rights under Article 18 EC", (2003) EL Rev., 706.

discretionary powers contingent upon the individual circumstances of each claimant, the ECJ compromises legal certainty: this test adds a layer of complexity to a field of law which is already notorious for its inaccessibility. As to the competing interests outlined above, much will depend on the balance which the ECJ strikes in further case law.

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